80-1540

No. _____

Office-Supreme Court, U.S.
FILED
MAR 10 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PARTIDO NUEVO PROGRESISTA, *Petitioner,*

v.

GERINELDO BARRETO PEREZ, ADMINISTRATOR,
PUERTO RICO ELECTIONS COMMISSION,

AND

PARTIDO POPULAR DEMOCRATICO, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR CERTIORARI

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March 10, 1981

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QUESTIONS PRESENTED

1. Whether the Due Process Clause requires that electoral laws be administered so as to provide fundamentally fair elections for public office.

2. Whether a post-election change in Puerto Rican electoral laws that retroactively alters the outcome of the election violates the Due Process Clause.

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PUERTO RICO ELECTIONS COMMISSION,

AND

PARTIDO POPULAR DEMOCRATICO, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR CERTIORARI

Partido Nuevo Progresista, one of Puerto Rico's major political parties, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on December 31, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals in this case, which is not officially reported, is reproduced as Appendix A to this petition. The opinion of the United States District Court for the District of Puerto Rico is not officially reported and is reproduced as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit (Appendix C) was entered on December 31, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Court has held that the demands of due process apply to Puerto Rico, but has found it unnecessary to rule whether the Due Process Clause of the Fifth Amendment ("No person shall . . . be deprived of life, liberty, or property, without due process of law") or the Due Process Clause of the Fourteenth Amendment ("nor shall any State deprive any person of life, liberty, or property, without due process of law") is the applicable provision. *See Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974).

Petitioner's cause of action is based on 42 U.S.C. §1983, which is reproduced as Appendix D. Various provisions of Puerto Rico's Electoral Law are relevant to petitioner's constitutional claim, and those provisions are set out in Appendix E.

STATEMENT OF THE CASE

The petitioner in this case is the Partido Nuevo Progresista ("PNP"), one of the two major political parties in Puerto Rico. The respondents are the Administrator of the Puerto Rico Elections Commission (also known as the Commonwealth Election Commission) and the Partido Popular Democratico ("PPD"), the other major Puerto Rican political party.

The general elections held in Puerto Rico on November 4, 1980 resulted in the closest electoral contest in the Commonwealth's history. In several races for mayor and for seats in the Puerto Rican House of Representatives, initial vote tallies indicated that only a handful of votes separated the candidates of the PNP and those of the PPD. (7a-8a, *infra*) Because of the closeness of the elections, an Island-wide recount was ordered. At the same time, the present dispute regarding the validity of improperly marked ballots arose.

The general elections were conducted pursuant to Puerto Rico's new Electoral Law enacted on December 20, 1977. *See* 16 L.P.R.A. §3001 *et seq.* (Supp. 1979). Article 1.033 of the new statute, 16 L.P.R.A. §3033(b), established mandatory standards for the voting system to be employed in Puerto Rican elections, including the following requirement:

> "[I]f the handwritten ballot is used, it must guarantee that the elector may vote by making any affirmative mark in the space under the printed insignia or device of the party, or within the square in which a candidate's name appears. *Any mark placed outside of said space or square shall be null and void, and deemed unmarked.*" (42a, *infra*) (emphasis added)

This explicit command represented a pointed departure from prior election statutes in Puerto Rico, which in any "case of doubt" allowed a ballot to be counted as "valid and effective" even though "the marking [on it] may be defective," so long as "the intention of the voter" was discernible. *See* 16 L.P.R.A. §220 (1972).

Shortly after the general elections were conducted, it became evident that many ballots — estimated to be as many as 1,000 — contained markings outside "the

space under the printed insignia or device of the party" in violation of Article 1.033 of the Electoral Law. (8a-11a, *infra*) Most of these markings occurred near the space containing the insignia of the PPD. (2a, 10a-11a, *infra*) On the petition of the PPD's representative, the Puerto Rico Elections Commission (the "Commission") ruled that such ballots could not be counted in light of the Electoral Law. (Appendix F) On appeal by the PPD, the Puerto Rico Electoral Review Board sustained the Commission, again relying on the clear dictates of Article 1.033. (Appendix G)

The PPD then appealed to the Puerto Rico Supreme Court, and the PNP intervened to protect its interests against the PPD's claims. On December 2, 1980, the Puerto Rico Supreme Court announced its decision, which is reproduced in Appendix H, that ballots marked in violation of Article 1.033 may be counted as valid. This judicial interpretation of the statute, which effectively reinstated prior statutes despite their repeal by the legislature, retroactively validated hundreds of mismarked ballots cast predominantly in favor of the PPD's candidates.

The PNP and three individual voters supporting the PNP promptly filed this action under 42 U.S.C. §1983 in the United States District Court for the District of Puerto Rico, alleging (*inter alia*) that this change in Puerto Rican law favoring the candidates of the PPD constituted a denial of due process. The district court found that it had jurisdiction under 28 U.S.C. §1343(a)(3) & (4). (12a-13a, *infra*) On the evidence then available, the district court concluded that validating the mismarked ballots would affect the outcome of several close elections; most significantly, the court found that counting the ballots could alter the result in the race for

one seat in the House of Representatives (District 35) that will determine whether the PNP or the PPD will win control of that body.[1] (7a-8a, 10a-11a, *infra*) Relying on the First Circuit's decision in *Griffin* v. *Burns,* 570 F.2d 1065 (1st Cir. 1978), the district court held that a due process violation had occurred and entered an injunction on December 24, 1980.[2] (19a-25a, *infra*) Because the mismarked ballots were easily identifiable, the district court did not have to order new elections in order to cure the unfairness. Instead, the district court ordered the Administrator of the Commission not to count the mismarked ballots and to eliminate such ballots from the vote tallies in the precincts where the ballots had been counted.[3] (26a-27a, *infra*)

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[1] Events after the district court's decision (and hence not a matter of record in this case) have largely borne out the district court's assessment. The PPD's challenges to ballots cast in favor of the PNP's candidate in House District 35 (*see* 8a n.2, *infra*) are pending before the Puerto Rico Supreme Court. If a sufficient number of the PPD's challenges are successful, the mismarked ballots may provide the margin of victory for the PPD's candidate and hence swing control of the House of Representatives to the PPD. In addition, although several of the municipal races have been settled on grounds independent of the validity of the mismarked ballots, the result in at least one mayoral race, in Aguas Buenas, hinges directly on the counting of the disputed ballots.

[2] The district court also held that the individual plaintiffs lacked standing and dismissed their claims. (16a-19a, *infra*) On January 22, 1981, that ruling was appealed to the First Circuit.

[3] A recount of the ballots cast in the general elections was ordered in mid-November 1980. During the recount of the first 68 of Puerto Rico's 113 precincts, *see* 16 L.P.R.A. §3208 (Supp. 1979), the mismarked ballots were not counted as valid pursuant to the decisions of the Commission and the Electoral Review Board. As a result of the decision of the Supreme Court of Puerto Rico, the mismarked ballots were counted as valid during the recount of the ballots cast in part of precinct 68 and in precincts 69 through 113. (10a, *infra*)

The PPD immediately appealed to the United States Court of Appeals for the First Circuit and moved for a stay pending appeal. On December 31, 1980, after oral argument, the court of appeals summarily reversed the district court, distinguishing its earlier decision in *Griffin* v. *Burns, supra.*[4] (5a, *infra*)

REASONS FOR GRANTING THE WRIT

This case necessarily raises the question whether participation in elections for public office as a voter, candidate, or political party is a "liberty" protected by the Due Process Clause. Over thirty-five years ago, in *Snowden* v. *Hughes,* 321 U.S. 1 (1944), this Court held that candidates for state office enjoy no protection under the Due Process Clause. Petitioner submits that *Snowden* is out of step with the Court's more recent authorities and should be overruled. This case provides an apt occasion for reexamining *Snowden* and defining a due process right to a fundamentally fair election.

I. The Court Should Overturn Its Decision In *Snowden* v. *Hughes,* 321 U.S. 1 (1944), Which Would Bar The Application Of The Due Process Clause To Ensure Fundamental Fairness In The Conduct Of Elections For Public Office, A Recurring Issue Of Manifest Public Importance.

The vital role of elections for public office under our system of government is universally acknowledged.

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[4] The court of appeals issued its mandate "forthwith" on the same day. (5a, *infra*) A motion for recall of the mandate and stay pending petition for certiorari was denied by the First Circuit on January 8, 1981. On January 9, 1981, an Application for Recall and Stay of Mandate of United States Court of Appeals for the First Circuit Pending Petition for Certiorari was filed with this Court. The application, No. A-601, was denied on January 26, 1981.

As this Court observed in *Wesberry* v. *Sanders,* 376 U.S. 1, 17 (1964):

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

In the past two decades, the right to participate in the electoral process has received increasing constitutional protection under the Equal Protection Clause, *see, e.g., Dunn* v. *Blumstein,* 405 U.S. 330 (1972), and the First Amendment, *see, e.g., Kusper* v. *Pontikes,* 414 U.S. 51 (1973). The constitutional rights of voters, *see, e.g., Carrington* v. *Rash,* 380 U.S. 89 (1965), and of candidates and political parties, *see, e.g., Williams* v. *Rhodes,* 393 U.S. 23 (1968), to take part in elections have prevailed over restrictive state electoral laws. This body of constitutional doctrine has assuredly served its avowed purpose of protecting the "legitimacy of representative government," which ultimately rests on free and open elections. *See Kramer* v. *Union Free School District,* 395 U.S. 621, 626 (1969).

The Court's decisions in this field have concentrated on the facial validity of state laws that deny or burden the rights to vote and to obtain a place on the ballot. As important as the advances made in these decisions are, the promise of cases securing the right to participate in the electoral process is undeniably frustrated if the electoral process itself is subverted by maladministration. In other words, the existence of state laws ensuring unhampered access to the democratic process does not ensure that the fundamental values underlying this Court's decisions — preserving the legitimacy of representative government, for example — will in fact be served during the *operation* of the process.

Since the evolution of the constitutional principles that have expanded electoral opportunities, the Court has not addressed the complementary and equally important issue of ensuring the proper administration of electoral laws. Consequently, the role of the Constitution's ultimate guarantee of fundamental fairness, the Due Process Clause,[5] in the context of contests for public office has not recently been authoritatively explored.[6] The Court last addressed this issue in *Snowden* v. *Hughes,* 321 U.S. 1 (1944), reaching a conclusion that would appear to bar any resort to the Due Process Clause to remedy unfairness in the conduct of elections.

[5] The concept of due process as "[r]epresenting a profound attitude of fairness . . . between individual and government," *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring), has found application in myriad parts of our legal system, including such diverse areas as the exercise of personal jurisdiction over nonresidents by state courts, *see World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), and choice-of-law decisions by state courts, *see Allstate Ins. Co* v. *Hague*, __ U.S. __, 49 U.S.L.W. 4071 (U.S. Jan. 13, 1981).

[6] On one recent occasion, a due process claim was asserted in this Court in analogous circumstances. On the eve of the 1972 Democratic National Convention, the Court was confronted with a due process challenge to a decision by the party's credentials committee unseating the majority of a state's delegation. The United States Court of Appeals for the District of Columbia Circuit had held the decision was fundamentally unfair and therefore violated due process. *See Brown* v. *O'Brien*, 469 F.2d 563 (D.C. Cir. 1972). Two days later, sitting in Special Term, this Court stayed the court of appeals' order setting aside the committee's decision. 409 U.S. 1 (1972). Although the Court found the due process issue to be "[h]ighly important," it expressed "grave doubts" about the lower court's action in view of the imminent commencement of the convention and the traditional role of that forum in resolving "intra-party disputes." 409 U.S. at 4, 5. *See also Cousins* v. *Wigoda*, 419 U.S. 477 (1975).

In the *Snowden* case, a candidate in a primary election for nomination to a seat in the Illinois General Assembly filed a civil rights action, alleging that the State Primary Canvassing Board had unlawfully refused to certify him as a victor in the primary. The Board's refusal, which was alleged to be in violation of Illinois law, denied the plaintiff a place on the ballot during the general election. This Court affirmed the dismissal of the complaint on the ground that it failed to state a claim under the Civil Rights Act, because it failed to allege the deprivation of a right secured by the Fourteenth Amendment.

The Court's opinion was devoted in large measure to the Equal Protection Clause, which the Court found unavailing to the candidate in the absence of an allegation of "intentional or purposeful discrimination." 321 U.S. at 7. The Court, however, also firmly rejected any possibility of a due process claim, holding that

> "an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause." 321 U.S. at 7.[7]

This holding continues to cast doubt on the due process rights of both candidates and voters, despite the strong implications in the Court's more recent decisions under the Equal Protection Clause and the First Amendment. Some courts have cited and followed *Snowden*'s due process holding as sound law. *See, e.g., Gamza* v. *Aguirre,* 619 F.2d 449, 452 n.3 (5th Cir. 1980). Other courts have concluded that *Snowden*'s due

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[7] This holding reaffirmed the Court's prior decisions in *Cave* v. *Missouri*, 246 U.S. 650 (1918) (*per curiam*), and *Taylor* v. *Beckham*, 178 U.S. 548 (1900).

process holding has been eroded by the Court's later decisions and is no longer an obstacle to due process challenges to the administration of state and local electoral laws. *See, e.g., Briscoe* v. *Kusper,* 435 F.2d 1046, 1052-53 (7th Cir. 1970); *Wright* v. *Mahan,* 478 F. Supp. 468, 470-72 (E.D. Va. 1979), *aff'd mem.,* 620 F.2d 296 (4th Cir. 1980). Still other courts have recognized the applicability of the Due Process Clause in such cases, ignoring *Snowden* and drawing support from this Court's more recent authorities. *See, e.g., Griffin* v. *Burns,* 570 F.2d 1065 (1st Cir. 1978).

A writ of certiorari should issue in this case so that the continued vitality of *Snowden* may be resolved. Petitioner submits that *Snowden* should be overruled to the extent it holds that the right to vote or to seek public office is not a "liberty" protected under the Due Process Clause.

II. This Case Presents An Appropriate Opportunity For Defining The Due Process Right To A Fundamentally Fair Election, An Issue That The Lower Federal Courts — Including The Court Of Appeals In This Case — Have Not Adequately Resolved.

Despite the inhibiting influence of the *Snowden* case, in the past decade candidates and voters have increasingly sought a constitutional remedy for maladministration of electoral laws by state authorities. In a few cases, the federal courts have explicitly or implicitly declined to follow *Snowden* and have granted relief under the Due Process Clause. *See Griffin* v. *Burns*, 570 F.2d 1065, 1075-79 (1st Cir. 1978) (class action by voters whose absentee and shut-in ballots were invalidated by post-election state court ruling placing novel interpretation on state electoral statute); *Briscoe* v.

Kusper, 435 F.2d 1046, 1054-56 (7th Cir. 1970) (class action by candidates and voters based on rulings by election board applying new, restrictive standards to validity of nominating petition signatures); *Williams* v. *Sclafani*, 444 F. Supp. 906, 910-14 (S.D.N.Y.), *aff'd mem. sub nom. Williams* v. *Velez*, 580 F.2d 1046 (2d Cir. 1978) (suit by candidate and voters based on change in official interpretation of validity of nominating petition signatures under state electoral law). *Cf. Brown* v. *O'Brien*, 469 F.2d 563, 569-70 (D.C. Cir.), *stay granted*, 409 U.S. 1, *stay vacated as moot*, 409 U.S. 816 (1972) (ruling by party's credentials committee effectively changing rules on seating of delegates at national convention). In other cases, relief under the Constitution has been denied. *See, e.g., Gamza* v. *Aguirre*, 619 F.2d 449 (5th Cir. 1980) (voters' and candidate's equal protection challenge to failure to count votes because of errors in operation of voting machine); *Saxon* v. *Fielding*, 614 F.2d 78 (5th Cir. 1980) (candidate's and voter's constitutional challenge to counting of irregular ballots); *Hennings* v. *Grafton*, 523 F.2d 861 (7th Cir. 1975) (class action by voters alleging infringement of voting rights arising from failure of voting machine to accurately record votes); *Pettengill* v. *Putnam County R-1 School District*, 472 F.2d 121 (8th Cir. 1973) (voters' challenge to counting of illegal ballots as denial of right to fair election); *Powell* v. *Power*, 436 F.2d 84 (2d Cir. 1970) (voters' due process and equal protection challenge to counting of illegal ballots); *Donohue* v. *Board of Elections*, 435 F. Supp. 957 (S.D.N.Y. 1976) (voters' claimed deprivation of constitutional right to vote as result of counting of illegal ballots).

The lower courts' opinions in these cases have not yielded a coherent rationale for constitutional relief or consistent guidelines for determining when such relief is

appropriate. Overruling the due process holding in the *Snowden* case and recognizing a due process right to a fundamentally fair election would provide the framework needed to rectify the current disarray in the law in this field. The next essential step is to define the indicia of fundamental fairness in the context of elections for public office. This case provides a fitting opportunity for such an undertaking.

One unresolved question of prime importance is whether proof of wrongful intent on the part of state authorities is a prerequisite to intervention under the Constitution. By analogy to criminal cases involving abuses like ballot box stuffing, *see, e.g., United States* v. *Saylor*, 322 U.S. 385 (1944), some courts have held that "wilful" or "fraudulent" conduct must be proved. *See, e.g., Hennings* v. *Grafton*, 523 F.2d 861, 864 (7th Cir. 1975). In other cases, such as *Griffin* v. *Burns*, 570 F.2d 1065 (1st Cir. 1978), relied on by the district court below, no showing of wrongful intent has been made or required.

A second and even more basic issue involves an examination of the circumstances under which the conduct of an election may properly be deemed fundamentally unfair. As this Court has noted, the states have developed comprehensive election codes that are essential to the orderly functioning of democratic processes. *Storer* v. *Brown*, 415 U.S. 724, 730 (1974). Certainly, not *every* violation of such codes or *every* abrupt reinterpretation or retroactive alteration of them in the context of an election necessarily deprives voters, candidates, and their political parties of a fundamentally fair election. A contrary, expansive view of due process protection would undoubtedly "thrust" the federal courts "into the details of virtually every election."

Powell v. *Power*, 436 F.2d 84, 86 (2d Cir. 1970). A much different situation is presented, however, when significant violations of state electoral laws (*e.g.*, the counting of illegal ballots) or reinterpretations or modifications of such laws (*e.g.*, the validating of ballots otherwise illegal) *affect the outcome of the election* by favoring one candidate or party over another. At least where state remedies for electoral code violations[8] are inadequate or, as here, produce the very change of law at issue, a due process remedy may be the only means for protecting the integrity of the electoral process.[9]

The court of appeals' reversal in this case places two unwarranted restrictions on such a due process cause of action. Consequently, if allowed to stand, the court of appeals' decision will seriously weaken the efficacy of the Due Process Clause in ensuring that the legitimacy of representative government is not undermined by unfair administration of electoral laws.

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[8] *See generally Developments — Election Law*, 88 Harv. L. Rev. 1111, 1298-331 (1975) (description of state post-election remedies).

[9] When the pursuit of state post-election procedures causes the reinterpretation or modification of electoral laws that unfairly alters an election's outcome, there can be no argument that the bar of *res judicata* can apply to the resultant due process cause of action. For example, in this case the PNP could not have advanced before the Puerto Rico Supreme Court the due process claim made in this lawsuit, because the claim arises from the supreme court's decision itself. In any event, the defensive nature of the PNP's intervention before the supreme court and its express *England* reservation should preclude the application of *res judicata*. *See Board of Regents* v. *Tomanio*, __ U.S. __, 64 L.Ed.2d 440, 454-57 (1980) (Brennan, J., dissenting). Accordingly, the First Circuit's suggestion (3a n.2, *infra*) that *res judicata* might be an alternative ground for reversing the district court is ill-founded.

First, the court of appeals observed that unlike the situation in *Griffin* v. *Burns*, 570 F.2d. 1065 (1st Cir. 1978), the change of law in this case allowed more, rather than fewer, ballots to be cast and counted in the election. (5a, *infra*) This distinction misses the point of fundamental fairness. The outcome of an election can as readily be altered by electoral code violations that cause the counting of unlawful ballots as by violations that cause the failure to count (or to permit the casting of) lawful ballots; similarly, reinterpretations or modifications that validate otherwise unlawful ballots have the same potential for affecting the result of an election as similar actions that invalidate otherwise lawful ballots. From the perspective of the disadvantaged candidates and parties and their supporters, the distinction between purported "enfranchisement" and "disenfranchisement" (5a, *infra*) is of little moment. In either case, the rules under which the election was to be conducted have not been followed, and as a result victory has been turned into defeat. Thus, either form of maladministration subverts the underlying purpose of electoral laws — to provide "fair and honest" elections and to ensure that "order, rather than chaos, . . . accompan[ies] the democratic processes." *See Storer* v. *Brown*, 415 U.S. 724, 730 (1974).

The second limitation adopted by the court of appeals is the requirement of a specific showing that voters (or, presumably, candidates and parties) relied to their detriment on the electoral rules that were not followed. (5a, *infra*) This holding appears to be a further narrowing of the court's focus on "disenfranchisement" as the *sine qua non* of a due process violation: Not only must it be shown that voters have been disenfranchised, but it must also be shown that the voters could have avoided being disenfranchised

had they known that the prevailing electoral rules would not be followed. To be sure, in certain cases proof of such reliance may be available. *See, e.g., Griffin* v. *Burns*, 570 F.2d 1065 (1st Cir. 1978) (persons casting absentee ballots later ruled invalid might have gone to the polls and voted in person). But the absence of such reliance in this case does not signal the presence of fundamental fairness. Candidates seek public office and citizens vote in elections with the central although unexpressed expectation that elections will be administered fairly — for example, that the electoral rules will not be reinterpreted or modified after a close election in a way that may be foreseen to change the outcome of the election. Certainly, if electoral laws are consistently abused in such a fashion, both candidates and voters will be discouraged from exercising their constitutional rights to participate in the political process. It is this more general kind of reliance interest that is protected by the due process command that elections be fundamentally fair.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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March 10, 1981

Certificate Of Service

I, John D. Taurman, an attorney for petitioner and a member of the Bar of this Court, certify that on this 10th day of March, 1981, the foregoing Petition for Certiorari was served upon respondents by mailing three copies thereof to each of the following:

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Puerto de Tierra
San Juan, Puerto Rico 00901

I further certify that all parties required to be served have been served.

/S/ JOHN D. TAURMAN
John D. Taurman

APPENDIX

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* Translation from Spanish to English certified by the Chief Clerk of the Supreme Court of Puerto Rico.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Misc. No. 80-8094

PARTIDO NUEVO PROGRESISTA, *et al., Plaintiffs, Appellees,*

v.

GERINELDO BARRETO PEREZ, Administrator, Puerto Rico Elections Commission, *Defendant, Appellee,*

PARTIDO POPULAR DEMOCRATICO, *Intervenor, Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Juan R. Torruella, *U. S. District Judge*]

Before Campbell, Bownes and Breyer, *Circuit Judges.*

Lino J. Saldana, with whom *Rafael Escalera Rodriguez* was on brief for appellant.

Hector M. Laffite for Partido Nuevo Progressita, appellee.

Miguel A. Pagan for Gerineldo Barreto Perez, Administrator, etc., appellee.

December 31, 1980

Per Curiam. Hearing has been held upon the motion of intervenor-appellant, Partido Popular Democratico, for a stay

of, and expedited appeal from, the district court's order in litigation involving a constitutional challenge to the tallying of ballots cast for local offices in the Puerto Rico general election of November 4, 1980.

The plaintiff-appellee[1] is the Partido Nuevo Progresista (PNP) which alleges that counting the ballots will tip the balance against its candidates in one or more closely contested races. The PNP maintains that the ballots were improperly marked and therefore invalid under the literal terms of Article 1.033(b) of the Electoral Law of Puerto Rico, 16 L.P.R.A. §3033(b), which provides in relevant part:

> "If the handwritten ballot is used, [the Electoral Commission] must guarantee that the elector may vote by making any affirmative mark in the space under the printed insignia or device of the party, or within the square in which a candidate's name appears. *Any mark placed outside of said space or square shall be null and void, and deemed unmarked.*" (Emphasis added.)

In the present case, the disputed ballots contained marks outside the designated spaces and squares. Most such marks were evidently placed directly above the list of candidates of the Partido Popular Democratico, the only major party with space above its ballot heading for such mismarks.

The Administrator of the Election Commission ruled the ballots invalid, a decision upheld on appeal by the Commonwealth's Electoral Review Board. The Supreme Court of Puerto Rico reversed. *Popular Democratic Party* v.

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[1] Plaintiffs in the district court included individual voters who were officials of or who favored the PNP and who claimed that their right to vote would be diluted by counting the disputed ballots. The district court dismissed as to these plaintiffs for lack of a justiciable controversy, citing, *e.g.*, *Schlesinger* v. *Reservists Committee*, 418 U.S. 208 (1974). An appeal from this aspect of the Court's order, if any has been noticed, is not presently before this court.

State Elections Commission, No. 0-80-646, 108 D.P.R. _____ (Dec. 2, 1980). That court construed 16 L.P.R.A. §3033(b), despite its literal prohibition of the tallying of mismarked ballots, to permit such tallying where the intent of the voter was clear.

Such a construction of local law by the highest court of the Commonwealth might seem to have ended the matter. The PNP, however, subsequently brought this action pursuant to 42 U.S.C. §1983, claiming constitutional violations in several particulars:[2]

> "Insofar as the ballots at issue have a blank space above the columns of two parties, Partido Popular Democratico (PPD) and Partido Socialista Puertorriqueno (PSP), as described in Exhibits 'A' and 'B' hereto, and insofar as said ballots provide no such blank space above the columns of the remaining two parties (as well as above the write-in column), but rather have space fully occupied by printed matter, then the validation of

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[2] As an intervenor in the Puerto Rico Supreme Court case, the PNP is arguably barred by the doctrine of *res judicata* from litigating the constitutional claim. *See Lovely* v. *Laliberte*, 498 F.2d 1261, 1263 (1st Cir.), *cert. denied*, 419 U.S. 1308 (1974). The PNP maintains that it expressly reserved the constitutional issue when it intervened and may, under the doctrine of *England* v. *Board of Medical Examiners*, 375 U.S. 411 (1964), raise the issue in federal district court. It seems likely under decisions of this court, *see Landrigan* v. *City of Warwick*, No. 80-1053, slip op at 5 n.2 (1st Cir. Aug. 27, 1980); *Sylvander* v. *New England Home for Little Wanderers*, 584 F.2d 1103, 1108 n.8 (1st Cir. 1978); *Lovely* v. *Laliberte*, 498 F.2d 1261, 1263-64 (1st Cir. 1974), and a recent decision of the United States Supreme Court, *see Allen* v. *McCurry*, 49 U.S.L.W. 4015, 4018-19 n.17 (Dec. 9, 1980), that *England* does not apply to a suit initially brought in a state court and that ordinary principles of *res judicata* therefore are applicable. Without expressly deciding this issue, we have determined to proceed to the merits as we find it clear that, in any case, appellees PNP cannot prevail.

any marks placed on such blank spaces would *de facto* grant a privilege to the parties under said blank spaces, thereby depriving plaintiffs of their Fifth and Fourteenth Amendments right to enjoy the equal protection of the laws.

* * *

"The ballots have been cast and the election is over. Prior thereto, both the statute, 16 L.P.R.A. 3033(b), and the Manual of Procedure for the Election, widely published, contained an express representation and warranty to plaintiffs and to the electorate in general, that the ballots at issue (Exhibits A and B hereto) would be rendered null and void. Defendant cannot change such rule of law retroactively, and, if he does, it would violate plaintiffs' right not to be deprived of their liberty and First Amendment rights without procedural and substantive due process of law."

The district court, relying on this court's opinion in *Griffin* v. *Burns*, 570 F.2d 1065 (1st Cir. 1978), held for the PNP, saying,

"In our opinion the lesson to be learned from *Griffin* is, that changing the rules of the game after it has been played and the score is known, violates fundamental rules of fair play. Such action gives the appearance of, as well as is, actual unfairness and consequently violates due process of law. The counting of ballots after an election which, under the rules prevalent at the time of the vote-casting were considered void and invalid, is the practical and functional equivalent of alteration of ballots or of stuffing the ballotbox, because as in those cases, it amounts to the counting of legally inexistent votes. Cf. *United States* v. *Classic*, 313 U.S. 299, 315 (1941). It thus brings about the dilution and debasement of the validly cast votes.

"Given the circumstances of this case, we are of the opinion that substantial Federal constitutional rights of

> Plaintiff NPP have been affected, which considering the lack of an adequate remedy at law and the irreparable nature of the injury to be suffered, entitle this party to equitable relief before this Court. Common sense and justice dictate this outcome."

The court thereupon enjoined defendants from counting ballots not marked in accordance with the literal terms of 16 L.P.R.A. §3033(b).

We hold that the district court erred in its conclusion that *Griffin* v. *Burns* permitted federal court intervention in this case. In *Griffin* we held that the election process had reached "the point of patent and fundamental unfairness," and ordered a new election. Voters there had been told for many years that they could vote in a primary by absentee ballot, and such ballots had been furnished them by election officials in the challenged election. After the election they were told that their absentee ballots were void. Unlike *Griffin*, this case does not involve a state court order that *dis*enfranchises voters; rather it involves a Commonwealth decision that *en*franchises them — plaintiffs claim that votes were "diluted" by the votes of others, not that they themselves were prevented from voting. Moreover, in *Griffin*, had those casting absentee ballots known of their possible invalidity, many might have gone to the polls and voted in person. Here there was no such reliance upon an official interpretation of the local election law; no party or person is likely to have acted to their detriment by relying upon the invalidity of ballots with marks outside the ballots' drawn rectangles. For these reasons, we believe this case falls not within the purview of *Griffin* but within the area delineated by the Second Circuit, in *Powell* v. *Power*, 436 F.2d 84 (1970), as inappropriate for federal court review in a civil rights action, lest the federal court "be thrust into the details of virtually every election. . . ." *Id.*, at 86.

The order of the district court is reversed. Mandate to issue forthwith.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
Civil Number: 80-2420

PARTIDO NUEVO PROGRESISTA, RAFAEL RODRIGUEZ AGUAYA, MIGUEL TIRADO and LUIS RODRIGUEZ SUAREZ, *Plaintiffs,*

v.

GERINELDO BARRETO PEREZ, Administrator, Puerto Rico Elections Commission, *Defendant.*

PARTIDO POPULAR DEMOCRATICO, *Intervenor.*

OPINION AND ORDER

This controversy arises as a by-product of the general elections held in Puerto Rico on November 4, 1980 which resulted in the closest political contest in the Commonwealth's history.

Out of approximately 1,700,000 voters who cast their ballots for the four contending parties (the New Progressive Party, NPP; the Popular Democratic Party, PDP; the Puerto Rican Independence Party, PIP; and the Puerto Rican Socialist Party, PSP), the gubernatorial race was won by the NPP contender over the PDP candidate by 3,503 votes, which is less than .5% of the total votes cast.[1] The mayoral outcome in several of the municipal elections is also hotly contested, with the results being decided by very few votes: Juana Díaz (14 votes), Trujillo Alto (15 votes), Aguas Buenas (5 votes), Barranquitas (28 votes).

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[1] Carlos Romero Barceló (NPP), 759,540; Rafael Hernández Colón (PDP), 756,037; Rubén Berrios Martínez (PIP), 87,238; Luis Lausel Hernandez (PSP), 5,241.

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This contest is even more dramatic in House of Representatives District 35 (which is comprised of the Municipalities of Fajardo, Vieques, Culebra, Río Grande, Luquillo and Precinct 102 of Ceiba). In this District the PNP leads the PDP by 5 votes, out of a total of approximately[2] 48,392 votes cast. Whichever of these two parties wins District 35, it will also win control of the House of Representatives, by one seat. The PDP has already won control of the Senate, 15 seats to the PNP's 12 seats.

Against this stimulating background we come to the controversy in the present case.

Article 1.033(b) of the Electoral Law of Puerto Rico, which has been in effect since December 20, 1977, codified at 16 L.P.R.A. 3033(b), states as follows:

> "The rules adopted by the Commission to implement any of the voting systems deemed suitable shall provide for secret ballot, and shall not unduly favor or hinder any political party or candidate, nor produce onerous conditions for any elector or group of electors. Also, *if the handwritten ballot is used, it must guarantee that the elector may vote by making any affirmative mark in the space under the printed insignia or device of the party, or within the square in which a candidate's name appears. Any mark placed outside of said space or square shall be null and void, and deemed unmarked.*" (Emphasis supplied).

The Procedure Manual for Election Officials ("Manual de Procedimientos Para Funcionarios de Colegio y Coordinadores de Unidad Electoral") prepared by the

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[2] It should be noted that in this District, as throughout Puerto Rico because of the close outcome of the election, a general recount is being completed by the Puerto Rico Electoral Commission. At present the PNP's lead in District 35 is being challenged on various grounds before the administrative processes of the Commission for reasons unrelated to this case. It is likely that those challenges will end up before the Supreme Court of Puerto Rico.

Election Commission, which is composed of one commissioner from each party as well as the General Administration of Elections, states in Section 32 thereof as follows:

> "Any mark of those considered as valid (except for names or initials) that appear in the blank spaces of the write-in column, or *in other spaces outside of the columns of the parties shall be deemed as not having been made.*" (Translation and emphasis supplied).

Other language in that section of the Manual states as follows:

> "We shall consider valid marks any cross (X), check mark (✓), dot (.), dash mark (—), circle (o) or variations of those marks that are clearly distinguishable which reflect the voter's intention.
>
> Any valid mark which is inside the column of the party in the area which corresponds to the party's insignia, whether this mark be: below, over, on the side or on the party insignia shall be considered a vote in favor of all the candidates of this party in the corresponding precinct. . . .
>
> To determine the intention of the voter when the marks touch other columns or other candidates within the column or of a different party, the following criteria shall be taken into account:
>
> If the marks are a cross (X) which might touch or pass onto another column, the point of intersection of the two lines shall determine the intention of the voter. The same will be done if a check mark (✓) is involved which touches or crosses into another column: the point where the two lines touch will be taken as signifying the voter's intention. In the event of marks that are made with a dash (—), the starting point of the line will be used to determine the intention, if this is clearly distinguishable." (Translation ours).

Throughout this Manual there are also various examples of marked ballots, all of which indicate the marking inside the ballot squares.

We also take notice of the fact that throughout the pre-election period the Electoral Commission and the various parties carried out massive, Island-wide voter education programs in the various news media in which the proper method of voting was duly explained and emphasized. In fact, one of the parties here in contention, the PDP, has had as its major party slogan since 1940: "Una sola cruz *debajo* de la pava" — "One cross only *beneath* the straw-hat."[3] (Translation and emphasis ours).

As things would have it however, somewhere between 500 and 1000 voters throughout Puerto Rico marked their ballots outside "the space under the printed insignia or device of the party" or outside "the square in which a candidate's name appears."[4] Although the exact number is not presently known[5] there is no question that a number of these disputed ballots were cast in Juana Díaz, Trujillo Alto, Aguas Buenas, Barranquitas, and Representative District 35. Furthermore we harbor no doubts but that these disputed votes almost

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[3] The straw "jibaro" hat on a "jibaro" (the hill-dwellers of Puerto Rico) has been the PDP symbol since its founding days.

[4] See Appendix A for an example of the typical ballot in question.

[5] In Precincts 1 through part of 68 (which is Juana Díaz), the Electoral Commission considered these ballots as void, and as such, included them within the count of other void ballots without accounting for them in a separate category. Partway through the recount of Precinct 68, the Supreme Court of Puerto Rico reversed the Electoral Commission's ruling, as we shall discuss in the body of this opinion, and thereafter these ballots were included and counted as valid votes, again without a separate accounting being officially kept by the Commission. Our findings on this issue are based on the testimony and evidence of the party officials who did keep a log.

exclusively favor the PDP and are in sufficient numbers to decide the final outcome of those elections.

On November 14, 1980, Gerineldo Barreto Pérez, the Administrator of the Puerto Rico Election Commission, ruled that pursuant to Article 1.033(b) of the Electoral Law, supra, the ballots in question were null and void. This ruling was appealed by the PDP to the Electoral Review Board where it was upheld on November 17, 1980. Thereafter the PDP sought review before the Supreme Court of Puerto Rico. The NPP intervened in the proceeding before the Supreme Court, the consequences of which we shall presently discuss in further detail. On December 2, 1980 the Supreme Court reversed the Electoral Review Board and ordered the validation and counting of these ballots (Case Number 0-80-646, reported at 108 D.P.R. _____ (1980).

On December 4, 1980 the complaint was filed in this case. The Plaintiffs are the NPP, Miguel Tirado Gonzalez, as a resident of Carolina who voted in that municipality, Luis Rodríguez Suárez also a Carolina voter, and Rafael Rodríguez Aguayo, a San Juan voter-resident. Tirado González is Undersecretary of the NPP and Rodríguez Aguayo is its General Secretary. The Defendant is Gerineldo Barreto Pérez, who as previously indicated, is the Administrator of the Elections Commission. Claiming violation of Federal constitutional rights under the First, Fifth and Fourteenth Amendments of the Constitution, and invoking the protection of the Civil Rights Act, 42 U.S.C. 1983, Plaintiffs seek a declaratory judgment and injunctive relief to prevent Defendant from counting the questioned ballots.

This Court ordered Plaintiffs to notify all other political parties of the filing of this action, and on December 17, 1980 the PDP intervened herein and filed an answer. The PIP and PSP have not entered an appearance herein.

On December 18 and 19, 1980 a consolidated hearing on preliminary and permanent injunction[6] was held with the full participation of all parties hereto.

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[6] This action was taken by the Court by reason of the obvious urgency of this matter, in that the Constitution of Puerto Rico

JURISDICTION, RES JUDICATA, PRIVITY AND STANDING

Intervenor PDP has challenged the jurisdiction of this Court, alleging that the Supreme Court of Puerto Rico has the exclusive jurisdiction to determine the validity of the votes in question pursuant to its interpretation of the Laws of Puerto Rico, and that any appeal from such a decision can be made only to the Supreme Court of the United States within the limited range provided by 28 U.S.C. 1258. The PDP also claims that since the NPP intervened in the Supreme Court review, the NPP and all persons in privity (which allegedly includes individual Plaintiffs all of whom are NPP officers and/or members) are bound and prevented by the principles of *res judicata* and collateral estoppel from challenging said decision in this Court. Finally, Intervenor questions the standing of the individual Plaintiffs to challenge the counting of the questioned ballots in any precinct other than that in which they cast their ballot in the November 4, 1980 elections.

All of these questions are closely intertwined.

The jurisdiction of this Court is clearly established by 42 U.S.C. 1983 and its procedura[1] counterparts in 28 U.S.C. 1343 (a)(3) and (4). *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero,* 426 U.S. 572 (1976); *Griffin* v. *Burns,* 570 F. 2d 1065, 1070 (C.A. 1, 1978).

42 U.S.C. 1983 reads in its pertinent part as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes

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provides that the term of office for the Governor, and for Senators and Representatives begins on the second day of January of the year following the election, i.e. in this case on January 2, 1981. P.R. Const.Art. IV Sec. (Governor); Art. III Sec. 8 (Senators and Representatives). The Municipal Law, 21 LPRA Sec. 1101 *et seq.*, provides that the municipal assemblies shall hold their inaugural session on the second Monday of January following the general elections. 21 LPRA 1156.

to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

28 U.S.C. 1343(a)(3) and (4) in their pertinent parts state:

. . . "(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

There is no question but that Plaintiffs' allegations fall within the purview of 42 U.S.C. 1983 and 28 U.S.C. 1343 (3) and (4) and thus the Court has jurisdiction to hear this action. Whether a cause of action has been proven, is a closer question which will be discussed in detail, but which does not affect our power to entertain and decide the subject matter of these allegations. *Bell* v. *Hood,* 327 U.S. 378, 382-83 (1946); *Brule* v. *Southworth,* 611 F. 2d 406 (C.A. 1, 1979).

From the record of the case before the Supreme Court of Puerto Rico it appears that in the PNP's Motion for Intervention, said party specifically reserved its Federal constitutional and statutory rights pursuant to *England* v. *Board of Examiners,* 375 U.S. 411 (1964). This reservation also appears in the brief accompanying said motion. The Administrator also made this reservation, both before the Supreme Court of Puerto Rico and during the prior administrative proceedings. Although the parties before the

Supreme Court of Puerto Rico argued constitutional grounds contained in the Constitution of Puerto Rico, which are similar to those in the Federal Constitution, we see nothing in either that record or in the decision of that Court which touches on any Federal issue, constitutional or statutory. For us to conclude that the Supreme Court of Puerto Rico passed upon these Federal questions, we would have to presume that it did so *sub silentio,* without the benefit of briefs or arguments on those issues, and against the specific *England* reservations by both appellee and intervenor before it, conclusions which cause us some degree of difficulty.

But the PDP takes another tack. It argues that the *England* reservation is ineffective because it is valid only in *Pullman* type[7] abstention cases, and therefore the PNP's voluntary intervention, even for limited purposes, has *res judicata* effects . . . "not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented . . ." *Cromwell* v. *County of Sac.*, 94 U.S. 351, 352-353 (1877); *Lovely* v. *Laliberte,* 498 F. 2d 1261, 1263 (C.A. 1, 1974), cert. den. 419 U.S. 1038 (1974).

There is no question but that in *England* v. *Medical Examiners,* supra, the Court had before it a case in which there was an abstention situation. In our view, however, we believe that Intervenor has missed the point. There is a constitutional right to having federal claims decided by federal courts. *Id.*, 375 U.S. at 415-16. A party, of course, may forego this right and submit all issues, including federal ones, to adjudication by the State tribunals which are fully competent under our constitutional-legal system to entertain and decide these issues, where the parties so provide. *Id.* at 417-418. But federal constitutional and/or legal questions are the basis for distinct and separate causes of actions, which if expressly reserved by a litigant, can be saved for adjudication before the Federal forum. *Lovely* v. *Laliberte,* supra, at pages

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[7] *Railroad Com. of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941).

1263-1264; *Sylvander* v. *New England Home For Little Wanderers,* 584 F. 2d 1103, 1108 (C.A. 1, 1978). See *Board of Regents* v. *Tomanio,* U.S. Sup. Ct. (May 19, 1980) 48 L.W. 4556, 4560, Cf. *Landrigan* v. *City of Warwich,* Slip Opinion (C.A. 1, August 27, 1980, footnote 2). We respectfully decline to follow the dicta in *Roy* v. *Jones,* 484 F. 2d 96 (C.A. 3, 1973); a case in which it appears that, not only did litigants fail to make an *England* reservation before the Pennsylvania courts, but in which they in fact appear to have made "specific arguments that the suspension order violated the appellants' *federal* constitutional rights", 484 F. 2d at 99 (emphasis in the original).

We have been assuming *arguendo* the validity of Intervenor's contention to the effect that the NPP voluntarily appeared before the Supreme Court of Puerto Rico, a conclusion which in the context of this case can be the subject of differing views. The PDP suggests that the appropriate action would have been for the NPP to remain aloof of the Supreme Court proceedings and to file its present action here, independently of the possibility of disposing of the controversy on non-federal grounds before that Court. Even with such a procedure, the PDP would have its cake and also eat it, as in that situation this Court would be forced to abstain from deciding pursuant to *Alabama Public Service Comm.* v. *Southern Ry. Co.,* 341 U.S. 341 (1951), but since this would not be *Pullman* type abstention, the NPP would not be entitled to an *England* reservation, and thus be deprived of a Federal forum for a decision of its Federal rights, to be left like the "little wanderers" in *Sylvander* v. *New England Home For Little Wanderers,* supra, from forum to forum.

Finally we should state that, considering the non-Federal basis of the decision of the Supreme Court of Puerto Rico, we fail to see how it could be the subject of review by the Supreme Court of the United States pursuant to 28 U.S.C. 1258.

We cannot see the rhyme or reason to such a conclusion. In our opinion the NPP acted correctly in appearing before the Supreme Court in seeking adjudication there of the State issues, while reserving its Federal questions under *England* for litigation in the Federal forum.

This conclusion moots the questions of privity raised by Intervenor, which in any event are clearly inapplicable to Plaintiff Rodríguez Suárez.

Although the standing by the NPP is unquestioned by Intervenor, this remains an open issue as to individual Plaintiffs.

In *Data Processing Service* v. *Camp.*, 397 U.S. 150, 150-151 (1970), the Court said:

> "Generalizations about standing to sue are largely worthless as such. One generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.' As we recently stated in *Flast* v. *Cohen*, 392 U.S. 83, 101, '[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' . . ."

No discussion of the issue of standing is complete without reference to the Supreme Court's ruling in *Warth* v. *Selding*, 422 U.S. 490 (1975), a decision which summarizes the law, at pages 498-502:

> . . . "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations of federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper — and properly limited — role of the courts in a democratic society.

In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* [emphasis in the original] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . .'

Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. . . . [E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the *plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.*

. . .

. . .

"Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted. The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . .' Moreover, the source of the plaintiff's claim to relief

assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes. Essentially, *the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.* In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties. In such instances, the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff. Moreover, *Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself even if it is an injury shared by a large class of other possible litigants. But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.*" (Emphasis supplied except as indicated; footnotes and citations omitted).

See also *Frothingham* v. *Mellon*, 262 U.S. 447 (1923); *Baker* v. *Carr*, 369 U.S. 186 (1962); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973); *Duke* v. *Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59 (1978); *Arlington-Heights* v. *Metropolitan Dev. Corp.*, 429 U.S. 252 (1977); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

The "personal stake" that is demanded of the federal litigant requires not only "a distinct and palpable injury" to that plaintiff, but also a "fairly traceable causal connection

between the claimed injury and the challenged conduct." *Duke Power Co.* v. *Carolina Env. Study Group,* supra, at page 72.

In the case of the individual Plaintiffs we cannot, without straining the connection to the breaking point, find the requisite causality between the alleged injury and the challenged conduct. *Schlesinger* v. *Reservists Committee To Stop The War,* 418 U.S. 208 (1974). Their actions are therefore dismissed for lack of standing.

THE DISPUTED BALLOTS

We thus come to the central issue in this case: Whether the counting by Defendant of the disputed ballots causes an injury to Plaintiff PNP of Federal Constitutional dimensions, redressable by this Court in an action under 42 U.S.C. 1983.

On this question our guiding light must be *Griffin* v. *Burns,* 570 F. 2d 1065 (C.A. 1, 1978).

In that case a special Democratic primary election was held in the Tenth Ward of Providence, Rhode Island to select the Democratic candidate to run in a special election for a vacancy on the Providence City Council. Rhode Island law, as it stood in March of 1977, expressly permitted absentee and shut-in ballots in "all . . . elections in the state for . . . city, town, ward or district officers", but did not specify whether the "elections" in which absentee and shut-in ballots were allowed extended to the party primaries for such offices. R.I. Gen. Laws. Sec. 17-20-1. The Secretary of State of Rhode Island and other election officials, believing the issuance of such ballots in party primaries to be authorized, and acting in accordance with a practice that had existed in Rhode Island for about seven years in the case of primaries, advertised and issued various such ballots for use in this primary. The primary was conducted, whereby the absentee and shut-in ballots gave candidate Lloyd Griffin a 15-vote plurality over candidate Thomas McCormick. Griffin was thereafter certified the winner by the Board of Canvassers.

After the primary, McCormick for the first time questioned the authority of the Secretary to issue and count absentee and shut-in ballots in a primary election. Failing to obtain relief in the State's administrative machinery, McCormick proceeded to file a petition for certiorari in the Rhode Island Supreme Court. In the petition, McCormick named as defendants, the State Board, the Board of Canvassers, the members of those boards, the Secretary of State, and his four opponents for the Democratic nomination. On April 27, 1977, the Rhode Island Supreme Court granted McCormick's petition and held that "there is no constitutional or statutory basis" for allowing the absentee and shut-in voters to cast their votes in a primary election. It thus ordered the invalidation of 123 such ballots and the quashing of Griffin's certification.

On April 27, 1977 the Board of Canvassers revoked Griffin's certification and on April 28, 1977, officially named McCormick the Democratic nominee. Griffin then filed a "Motion to Reargue" before the Rhode Island Supreme Court. That Court heard and rejected his contentions on May 2, 1977.

On April 29, 1977, while the motion to reargue was pending, Griffin and several shut-in and absentee voters who had cast their votes in the primary, sought a federal remedy and filed an action in the United States District Court for the District of Rhode Island, asking for temporary relief from invalidation of their ballots. Relief was denied initially in deference to the Rhode Island Supreme Court's pending considerations of Griffin's motion for reargument. After the state court's denial, Griffin and his co-plaintiffs again asked the district court for relief. This court issued a restraining order, holding that federally cognizable rights were implicated. The court declined jurisdiction over Griffin on the ground that his claim had been adjudicated by the Rhode Island Court (he had failed to make any *England* reservation). The district court invalidated the March 29 primary, postponed the general election and scheduled a new primary

and election in which the ground rules were clear. Preliminary to this order, the district court found as a fact that the absentee and shut-in vote had affected the outcome of the election.

The Court of Appeals sustained the district court's action. The Court of Appeals quoted from *Reynolds* v. *Sims.*, 377 U.S. 533 (1953), at pages 554-555:

> "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted. In *Mosley* the Court stated that it is 'as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box.' The right to vote can neither be denied outright *nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing.* As the Court stated in *Classic,* 'Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted. . . .' Racially based gerrymandering, and the conducting of white primaries, both of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. *And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.*" *Griffin,* 570 F. 2d at 1074-1075. (Emphasis supplied: citations and footnotes omitted).

In analyzing whether the complained action amounted to a constitutional violation entitling plaintiffs to a remedy in federal court, the Court of Appeals stated at 570 F. 2d 1077:

> "The federal court is not equipped nor empowered to supervise the administration of a local election. If every election irregularity or contested vote involved a federal violation, the court would 'be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.'
>
> But while, as the foregoing authorities indicate, local election irregularities, including even claims of official misconduct, do not usually rise to the level of constitutional violations where adequate state corrective procedures exist, there remain some cases where a federal role is appropriate. The right to vote remains, at bottom, a federally protected right. If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under §1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots; and the question of the availability of a fully adequate state corrective process is germane. But there is precedent for federal relief where broadgauged unfairness permeates an election, even if derived from apparently neutral action." (Citations omitted).

The Court then analyzes the decision in *Ury* v. *Santee,* 303 F. Supp. 119 (N.D. Ill., 1969), in which a federal district court invalidated a local election because of confusion caused by last minute precinct reductions, and *Briscoe* v. *Kusper,* 435 F. 2d 1046 (C.A. 7, 1970), also involving "eleventh hour change of policy."

The Court goes on to say (at 570 F. 2d 1078-1079):

> "While there is no single bright line to distinguish *Ury* and *Briscoe* from the cases cited earlier in which federal

courts have declined to intervene, it is apparent that in both cases the attack was, broadly, upon the fairness of the official terms and procedures under which the election was conducted. The federal courts were not asked to count and validate ballots and enter into the details of the administration of the election. Rather they were confronted with an officially-sponsored election procedure which, in its basic aspect, was flawed. Due process, '[r]epresenting a profound attitude of fairness between man and man, and more particularly between individual and government,' *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 163, 71 S.Ct. 624, 643, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), is implicated in such a situation. To be sure, Justice Frankfurter's language does not provide a litmus test for the determination of federal jurisdiction in every voting case. But *for present purposes there is guidance enough in the notion that due process is implicated where the entire election process — including as part thereof the state's administrative and judicial corrective process — fails on its face to afford fundamental fairness. Further than that we need not go. In cases falling within such confines, we think a federal judge need not be timid, but may and should do what common sense and justice require.*

'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'
Wesberry v. *Sanders*, 376 U.S. 1, 17, 84 S.Ct. 556, 535, 11 L.Ed. 2d 481 (1964).

The present situation, judged in light of the standards we have discussed, presented a due process violation for which relief under §1983 was appropriate. The district court was not asked to examine the validity of individual ballots or to supervise the administrative details of a local

election. It was asked to remedy a broadgauged unfairness that infected the results of a local election. The integrity of the Tenth Ward primary in Providence was severely impugned by the undisputed events leading up to Plaintiffs' suit. Almost ten percent of the qualified and voting electorate was, in effect, denied its vote in this close election because the Secretary of State, statutorily authorized manager of state elections, advertised, issued, and sanctioned the use of certain ballots *which the Rhode Island Supreme Court quashed after the results of the election were in.* Voting by absentee and shut-in ballots had been accepted in the state over a period of about seven years; the legislature had never acted to halt the practice, and indeed, directly after the Rhode Island Supreme Court's decision, moved to reinstate it, explicitly authorizing the use of absentee and shut-in ballots in state primaries. 1977 R.I.Pub. Laws ch. 153. Prompt objection to quashing the ballots was made in federal court by the voters; and the federal court acted only after they were refused permission to intervene at the state court proceeding. The district judge could justifiably conclude that the voters, including the black voters, would be offended by the cancelling of the ballots notwithstanding their established acceptability — *due process involves the appearance of fairness as well as actual fairness.* And the federal court was the only practical forum for redress: there appears to have been no standard state procedure for handling a claim such as this, *and the state court did not confront the questions that retroactive application of its ruling would create.*

In brief, we think this to be one of the perhaps exceptional cases where a district court could properly exercise the limited supervisory role that such courts have in election cases." (Emphasis supplied).

The Court concludes its analysis at 570 F. 2d 1080 by saying:

". . . While the 'outcome' test provides a sensible guideline for determining when federal judicial

> invalidation of an election might be warranted, it is not a principle requiring mathematical certainty. In cases of outrageous racial discrimination some courts have chosen not to apply it at all, but to invalidate the election simply for its lack of integrity. And when applied, different formulations of the test have been proposed: the irregularity 'could have altered the outcome', the outcome 'would not have been affected,' and altered outcome should be 'found readily where there is a serious violation and close election.' Here, the *closeness of the election was such that, given the retroactive invalidation of a potentially controlling number of the votes cast,* a new primary was warranted." (Emphasis ours; citations omitted).

In our opinion the lesson to be learned from *Griffin* is, that changing the rules of the game after it has been played and the score is known, violates fundamental rules of fair play. Such action gives the appearance of, as well as is, actual unfairness and consequently violates due process of law. The counting of ballots after an election which, under the rules prevalent at the time of the vote-casting were considered void and invalid, is the practical and functional equivalent of alteration of ballots or of stuffing the ballot-box, because as in those cases, it amounts to the counting of legally inexistent votes. Cf. *United States* v. *Classic,* 313 U.S. 299, 315 (1941). It thus brings about the dilution and debasement of the validly cast votes.

Given the circumstances of this case, we are of the opinion that substantial Federal constitutional rights of Plaintiff NPP have been affected, which considering the lack of an adequate remedy at law and the irreparable nature of the injury to be suffered, entitle this party to equitable relief before this Court. Common sense and justice dictate this outcome.

THE REMEDY

Citing *Griffin*, supra, Intervenor PDP states that "[t]he only remedy that can be granted in this kind of cases is the annullment of the affected election and the holding of a new one."

We decline this invitation to further anarchy.

Courts when sitting in equity are given great latitude in fashioning remedies. The purpose behind equitable relief is to correct the inequitable situation.

These principles were summarized in *Lemon* v. *Kurtzman*, 411 U.S. 192, 200-201 (1972):

> ". . . [E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable. 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.' Mr. Justice Douglas, speaking for the Court, has said:
>
> 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicability have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'
>
> In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." (Citations omitted).

The inequitable situation to be corrected in the present case is the counting of ballots that were marked by electors outside "the space under the printed insignia or device of the party" or outside "the square in which the candidate's name

appears." The evidence in the case was to the effect that these ballots have been duly safeguarded and that they can be readily identified and retrieved by the appropriate electoral authorities from the ballot bundles kept in accordance to law. Once this is accomplished, the re-talling of the ballots in affected elections is but a mere mathematical formality.

It is this remedy that is appropriate under the circumstances.

Wherefore, it is ORDERED:

(1) That Defendant Gerineldo Barreto Pérez, Administrator of the Puerto Rico Elections Commission, and all persons under his direction and employ or acting as his agents, as well as others acting in concert therewith, are hereby permanently enjoined and estopped from counting as valid any vote cast in the general elections held in the Commonwealth of Puerto Rico on November 4, 1980 which was marked by any elector outside "the space under the printed insignia or device of the party" or outside "the square in which the candidate's name appears", and further

(2) That said Defendant proceed forthwith and with all deliberate speed to carry out the appropriate recount and rectification in the affected precincts to allow for the certification of all concerned candidates by no later than December 31, 1980, at 12:00 P.M.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 24th day of December, 1980, at 2:30 A.M.

/s/ JUAN R. TORRUELLA
Juan R. Torruella
U.S. District Court Judge

APPENDIX A

MODELO

COMISION ESTATAL DE ELECCIONES
ELECCIONES GENERALES
PAPELETA ELECTORAL
4 DE NOVIEMBRE DE 1980

MODELO

PARTIDO NUEVO PROGRESISTA	PARTIDO POPULAR DEMOCRATICO	PARTIDO INDEPENDENTISTA PUERTORRIQUEÑO	PARTIDO SOCIALISTA PUERTORRIQUEÑO	
1	1	1	1	1
2	2	2	2	2
3	3	3	3	3
4	4	4	4	4
5	5	5	5	5
6	6	6	6	6
7	7	7	7	7
8	8	8	8	8
9	9	9	9	9
10	10	10	10	10
11	11	11	11	11
12	12	12	12	12
13	13	13	13	13
14	14	14	14	14
15	15	15	15	15
16	16	16	16	16
17	17	17	17	17
18	18	18	18	18
19	19	19	19	19
SENADORES POR ACUMULACION	SENADORES POR ACUMULACION	SENADORES POR ACUMULACION	SENADORES POR ACUMULACION	SENADORES POR ACUMULACION
1	1	1	1	1
2	2	2		
3	3	3		
4	4	4		
5	5	5		
6	6	6		
REPRESENTANTES POR ACUMULACION	REPRESENTANTES POR ACUMULACION	REPRESENTANTES POR ACUMULACION	REPRESENTANTES POR ACUMULACION	REPRESENTANTES POR ACUMULACION
1	1	1	1	1
2	2	2		
3	3	3		
4	4	4		
5	5	5		
6	6	6		

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Misc. No. 80-8094.

PARTIDO NUEVO PROGRESISTA, *et al.*, *Plaintiffs, Appellees*,

v.

GERINELDO BARRETO PEREZ, Administrator, Puerto Rico Elections Commission,

---

PARTIDO POPULAR DEMOCRATICO, *Intervenor, Appellant.*

JUDGMENT

Entered December 31, 1980

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The Order of the district court is reversed. Mandate is to issue forthwith.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Saldana, Laffite and Pagan.]

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APPENDIX D

TITLE 42 — THE PUBLIC HEALTH AND WELFARE

* * *

CHAPTER 21 — CIVIL RIGHTS

SUBCHAPTER I — GENERALLY

* * *

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(as amended Pub. L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1284.)

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APPENDIX E

Excerpts From The Puerto Rico Electoral Law, Act Of December 20, 1977, No. 4, *As Amended* To November 4, 1980 (16 L.P.R.A. §3001 *et seq.*)

TITLE 16. ELECTION AND REGISTRATION

* * *

Subtitle 5. Electoral Law

Chapter 301. General Provisions; Electoral Bodies

* * *

§3003. Definitions

For the purposes of this subtitle the following terms or phrases shall have the meaning expressed hereinafter:

. . .

(3) "Administrator" shall mean the General Administrator of Elections.

. . .

(9) "Commission" shall mean the Commonwealth Election Commission hereby created for the purpose of organizing and supervising all electoral processes.

(10) "Electoral Commissioner" shall mean the person designated by the Central Directing Body of a political party as its representative before the Commonwealth Election Commission.

. . .

(15) "General Election" shall mean that process by which the voters select the officials who are to fill elective public offices in the Government of the Commonwealth of Puerto Rico.

(16) "Elector" shall mean every person registered to vote in Puerto Rico under the provisions of this subtitle.

(17) "Board" shall mean the Electoral Review Board which is hereby created.

. . .

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(22) "Mark" shall mean any type of affirmative expression by the voter on the ballot.

. . .

(27) "Ballot" shall mean the document officially designed and printed by the Commonwealth Election Commission on which the voter shall mark his vote.

(28) "Straight Ballot" shall mean the ballot on which the voter casts his vote for the entire slate of a single political party.

(29) "Split Ballot" shall mean the ballot on which the voter votes for any combination of candidates, whether they are from the same party or not or are independent candidates, by marking individually on the election ballot or in combination with a mark under the insignia of a party, or by writing in names that do not appear on the ballot.

. . .

(32) "Unadjudicated Ballot" shall mean a ballot on which the poll inspectors have been unable to agree as to its adjudication, thus leaving the decision to the Election Commission as established hereunder.

(33) "Protested Ballot" shall mean a ballot that has had the insignia of any party ripped off, or on which a name has been written other than in the column for write-in candidates, or one on which a candidate's name has been crossed out, or that includes initials, words, marks or designs of any kind other than those permitted for voting.

. . .

§3004. Commonwealth Election Commission

The Commonwealth Election Commission is hereby created, composed of a General Administrator who shall be its Chairman, and an Electoral Commissioner for each of the principal political parties, parties by petition or coalesced parties.

. . .

§3005. General Administrator of Elections

The Administrator shall be appointed by the Governor of Puerto Rico, with the advice and consent of a majority of the members making up each Chamber of the Legislature of Puerto Rico, for a term of ten (10) years and until his successor is appointed and has qualified.

The appointee shall have resided in Puerto Rico for four (4) years prior to the date of his appointment, shall be a qualified elector, shall have recognized professional capability and moral integrity, and shall be knowledgeable or interested in electoral matters. Likewise, this person shall not have been a member of the central or municipal directing body of any political party, nor have filled any elective public office whatsoever, during the eight (8) years prior to his appointment.

. . .

* * *

§3007. — Powers and duties

The General Administrator of Elections shall be responsible to the People of Puerto Rico for the implementation and direction of the electoral procedures within an atmosphere of absolute integrity and impartiality. In discharging this task he shall have the powers, attributes and prerogatives inherent to the office, including, but without being limited to, the following:

(a) Planning, directing and supervising all electoral proceedings held pursuant to the provisions of this subtitle and the regulations adopted hereunder.

. . .

(h) Educating and informing the Puerto Rican elector and the political parties regarding their rights and obligations, for which purpose he may use all communications media and public information techniques available to him.

(i) Rendering a report to the Commission at its first meeting each month on administrative electoral matters he has considered and attended to since the last meeting.

. . .

(l) Drawing up and submitting for the Commission's consideration such rules and regulations as may be needed to implement the provisions of this subtitle that are within its jurisdiction.

(m) Taking any other necessary and appropriate action to implement this subtitle.

. . .

* * *

§3012. Electoral Commissioners

The Electoral Commissioners and Alternate Commissioners representing political parties shall be appointed by the Governor of Puerto Rico upon petition of the central directing body of the party they represent. They must be persons of recognized moral integrity, qualified electors, residents of Puerto Rico for four (4) years prior to their appointment, and knowledgeable about electoral matters.

. . .

§3013. Functions, duties and powers of Commission

The State Election Commission shall be the body responsible for organizing and supervising all electoral procedures that govern any election to be held in Puerto Rico, pursuant to this act and its regulations. In the performance of this function, it shall have the following duties, in addition to any others provided in this subtitle:

(a) To study the problems of an electoral nature that may affect the Puerto Rican community, and design an integral plan directed towards greater efficiency, promptness and the solution of all electoral problems, matters and procedures.

. . .

(e) To deal with, investigate and resolve matters or controversies submitted for its consideration by any interested party.

. . .

(l) To approve and adopt the rules and regulations needed to implement the provisions of this subtitle within its jurisdiction. These shall take effect, after due notice to the Governor and the Legislature of Puerto Rico, by publishing them in two (2) newspapers of general circulation, twice within a period of two (2) weeks, without having to comply with the provisions of sections 1041-1059 of Title 3, known as the "Rules and Regulations Act of 1958".

* * *

§3015. Jurisdiction; procedures

The Commission shall have original jurisdiction, either motu propio or at the request of the interested party, to consider, take cognizance and resolve any matter or controversy of an electoral nature, unless said jurisdiction has been reserved to the Electoral Review Board by virtue hereof.

. . .

* * *

§3017. Electoral Review Board, creation

The Electoral Review Board is hereby created to be composed of three (3) members appointed by the Governor, with the advice and consent of a majority of the members of each House of the Legislature of Puerto Rico, for a term of ten (10) years each, and until their successors are appointed and duly qualified.

. . .

* * *

§3022. Powers, obligations and duties of Board

The Board shall have the following powers, obligations and duties in addition to any others provided under this subtitle or its regulations:

(1) To investigate and resolve, in first instance, any actions initiated or brought by voters, pursuant to section 3051 of this title, Rights and Prerogatives of Electors.

(2) To investigate and resolve, in first instance, matters or controversies related to the disqualification of candidates in primaries, pursuant to the provisions of section 3157 of this title.

(3) To investigate and resolve, in first instance, any complaint presented based on the allegation that a candidate in a primary or a general election does not meet the requirements established by the Constitution of Puerto Rico, any other applicable law or this subtitle, pursuant to the powers vested in the Board under section 3167 of this title.

(4) To investigate and participate in the solution of controversies that may arise during primary election procedures.

(5) To investigate and resolve, in first instance, any objection to the election returns, pursuant to the provisions of 3264 [*sic*: 3274] of this title.

(6) To investigate and resolve any appealed resolution, determination or order of the Election Commission.

(7) To perform any investigation it may deem necessary to adjudicate matters or controversies submitted for its consideration and resolution.

(8) To hand down opinions and make recommendations to the Commission regarding matters under the Board's jurisdiction.

. . .

§3023. Appeals from actions of Commission

Any party affected by a resolution, ruling or order of the Commission may file an appeal before the Board within five

(5) days following notice thereof. The Board must resolve this appeal within a term of ten (10) days after its submission, but never later than thirty (30) days following its filing. These terms shall be twenty-four (24) hours and five (5) days, respectively, if the appeal is filed within thirty (30) days prior to an election.

Every matter or controversy that may arise within five (5) days prior to an election must be processed according to the terms and procedures established in subsection (c) of section 3015 of this title.

§3024. Review by Supreme Court

The findings of fact of the Board shall be final, but any aggrieved party may bring an appeal for review to the Supreme Court of Puerto Rico based on questions of law, provided it is done within the terms established in section 3023 of this title.

. . .

* * *

§3033. Voting system

The Commonwealth Commission shall determine, by resolution, the voting system to be used in the polling places at least sixty (60) days prior to the date of a general or by-election, referendum or plebiscite. Such resolution shall include the rules that may have been adopted by the Commission, subject to the pertinent provisions of this subtitle, applicable to the authorized voting system or systems. When the voting system and the rules to implement it have been approved, the Commission shall proceed to notify the political parties, independent candidates or participating organizations through their representatives, of the same, without delay. It will also publish and post said resolution and rules, for the information of the electors, in every Local Commission, as well as in every City Hall and Internal Revenue Collection Office, and in at least two (2) newspapers of general circulation, at least two (2) times within the period comprised between sixty (60) and thirty (30) days prior to the voting date.

(a) The Commonwealth Commission shall notify the political parties, organizations and independent candidates that shall participate in the election, and supply them with a copy of any proposed rules for the voting system that are to be considered for approval, as provided above, and will hold public hearings so that the citizens in general may have the opportunity to state their views thereon. Said hearings shall be called through notices published in the above-stated manner, and will inform the public that there will be copies available of the rules to be considered at said public hearings, in the Commission's office, for everyone.

(b) The rules adopted by the Commission to implement any of the voting systems deemed suitable shall provide for secret ballot, and shall not unduly favor or hinder any political party or candidate, nor produce onerous conditions for any elector or group of electors. Also, if the handwritten ballot is used, it must guarantee that the elector may vote by making any affirmative mark in the space under the printed insignia or device of the party, or within the square in which a candidate's name appears. Any mark placed outside of said space or square shall be null and void, and deemed unmarked.

(c) The voting systems, and the rules which will implement them, shall only provide polling places that will be open to receive the electors to cast their votes from nine o'clock (9:00) in the morning to three o'clock (3:00) in the afternoon of election day. The Commission shall evaluate, from time to time, the machine voting systems available for their possible adoption in Puerto Rico, and shall file its recommendations to this effect with the Secretary's office of each Legislative House no later than July 1 of the year following each general election, commencing with the 1980 general election. The Commission shall not adopt any mechanized voting system to be used in the polling places without the prior approval of the Legislature.

§3034. Uniformity

The power to regulate, conferred pursuant to this subtitle upon the electoral bodies hereby created, must be exercised in such a way that it will contribute towards the holding of every election under the same uniform standards, insofar as it is feasible and compatible.

Nevertheless, the Commonwealth Commission shall adopt those regulations or standards which are needed for the implementation of a specific election, and regarding which there is no applicable provision in its general regulations.

* * *

Chapter 303. Electors And Registration

§3051. Rights And Prerogatives of electors

In order to guarantee the free exercise of the electoral franchise, as well as to achieve the clearest expression of the people's will, we declare as valid and necessary the following rights and prerogatives:

(1) The administration of the Commonwealth electoral bodies within a framework of strict fairness, integrity and justice.

(2) The guarantee of the right to an equal, free, direct and secret vote to each person.

(3) The citizen's right to the straight, split and independent vote under equal conditions in each case.

(4) The elector's right to participate in the registration of parties and the registration of independent nominations.

(5) The right of affiliated electors to participate in the adoption of bylaws and programmatic bases of their respective political parties, as well as in the election process of the candidates thereof.

(6) The right of every affiliated elector to dissent regarding the affairs of his respective political party which are nonprogrammatic or nonregulatory in nature.

(7) The right of every affiliated elector to due process of law in every internal disciplinary procedure, as well as in the deliberative and decision-making processes of his party.

(8) The right of the affiliated elector who aspires to a candidacy to request primaries and to hold the same pursuant to the guarantees, rights and procedures established in this subtitle.

(9) The right of the affiliated elector to receive information with regard to the party's use of its funds.

(10) The right to cast his vote freely, and to have it counted and awarded in the way it is cast by the voter.

(11) The prevalence of the citizens' voting rights over the rights and prerogatives of all the political parties and groups.

The Administrator shall assume the affirmative function of educating the elector on the above-stated rights.

To this effect, electors are granted the legal capacity to initiate or institute any legal action pursuant to this Electors' Bill of Rights and Prerogatives before the Electoral Review Board, created by virtue of section 3017 of this title.

* * *

Chapter 309. Procedures Prior To Election; Voting

* * *

§3205. Purpose of general election

All officials who, pursuant to the Constitution of Puerto Rico and other special statutes, must fill public office by popular vote in the Commonwealth of Puerto Rico shall be elected in the general election.

* * *

§3211. Electoral ballot

In each election there shall be only one ballot to vote, which shall be called the "Electoral Ballot" and which shall contain the names of all candidates for election in the municipality or precinct where it is used.

Subject to the provisions of this subtitle, the Commission shall determine, through regulation, the printed design and text that shall appear on the ballot to be used in each election.

The ballots of each electoral precinct shall be of uniform size and printed with black ink on heavy paper so that the printing thereon cannot show through to the back.

The emblem for each party shall be printed at the top of the proper column, and immediately below it, the list of the candidates, together with the offices for which they have been nominated. When there are two or more offices having the same title, said title shall appear only once over the list of candidates for such office. The names of the candidates shall be placed approximately half an inch from center to center of the names, the name of each candidate having at its left a number and sufficient blank space for the proper electoral mark.

The names of the candidates for the office of senators and representatives-at-large, with their corresponding devices, shall appear at the lower end of the same ballot, and each class of candidates shall be separated from the others by a heavy line; the names of the candidates for senators-at-large to appear first on the said ballot, and next in order, separated by another heavy line, the names of the candidates for representatives-at-large; Provided, That the General Administrator of Elections shall direct that the names of the senators and representatives-at-large be printed in the same sequence in which they were certified for each municipality or precinct by the central directing body of the party having the right to nominate said candidates.

The electoral ballot shall also contain a column with the heading "Direct Nomination" without any emblem, and containing, like the other columns corresponding to the principal parties and parties by petition, the titles of the offices for which candidates are to be voted at the election, and under the said title, instead of the names of candidates, there shall be as many blank lines as there are candidates to

be voted on for each class of office. A voter wishing to vote for candidates not appearing in the columns of the principal parties, or independent candidates, may do so by writing the name or names in the column for direct nomination in the corresponding place, and he may also vote for other candidates appearing in other places on the electoral ballot by making a mark in the space of each one of said candidates, provided they are not inconsistent with the candidates voted for in the column for Direct Nomination.

. . .

* * *

§3229. Voting procedure

At nine (9:00) o'clock on election day, the members of the Polling Place Board present shall open the polling place. The electors shall form a line according to the order of arrival and shall file past the table one by one where the Poll Board is located.

The Board shall locate the person's name on the list of electors assigned to the polling place and within three minutes shall verify the elector's identity through an examination of his personal description and the Elector's Identification Card. If this verification is sufficient to establish the elector's identity, the Board shall proceed to hand him a ballot and a pencil to cast his vote. The elector shall sign or mark the final polling list on the line where his name is written when he receives his ballot.

The polling inspector may explain the voting procedure if requested to do so. It is forbidden for any other person in a polling place to instruct any elector as to the manner of voting.

The elector shall then proceed, alone, to one of the voting booths and shall proceed to vote using the corresponding marks. Only one person may be in a voting booth at a time, except as provided by law or regulations for physically disabled persons, and the voter may remain in the booth only as long as he needs to cast the vote.

When he has voted, but before leaving the voting booth, the voter shall fold the ballot several times in such a way that no part of the face shall be exposed to view. As soon as this operation is completed, he shall leave the booth and shall deposit his ballot in the ballot box in the presence of the poll inspectors.

Every voter shall leave the polling place immediately after voting.

* * *

§3231. Method of voting

The Commonwealth Election Commission shall provide by regulations the way in which the voters shall mark their ballot to consign their vote. The method of marking the ballot shall be the simplest possible which conforms to the ballot's design and will permit issuing a vote for a straight ticket or for a split ticket.

The Commission shall give widespread publicity to such standards during the thirty (30) days prior to election day through the press, radio, television or any other public information media deemed convenient.

* * *

Chapter 311. Procedures After Voting

* * *

§3262. Nonadjudicated ballot

No ballot shall be adjudicated to a party or candidate except by the unanimous vote of the Poll Board inspectors. No ballot may be declared null by a Poll Board. In any case in which the inspectors cannot agree on whether a ballot should be counted or not during the canvass, they shall mark it on the back with the phrase "not adjudicated", and shall state briefly in writing, thereunder, their respective opinions as to why said ballot should not be counted. Each one of them shall sign his statement and shall set forth the title of his position in the polling place.

A ballot shall not be adjudicated when it reflects a double voting for two opposing parties, in addition to the reasons for protesting ballots provided in section 3003 of this title. These shall be the only reasons for refusing to adjudicate a ballot in the polling place.

If there are more candidates marked on a ballot for the same position than those authorized to the voter, the vote for that position shall be annulled, but the votes in favor of the candidates that were correctly selected for the other positions on the ballot shall be counted.

* * *

§3264. Protested ballot

Votes on protested ballots shall not be counted for candidates, but they shall be entered in the proper columns of the Poll Certificate so that the Election Commission may act with regard to the same, as provided herein in connection with the general canvass.

* * *

§3268. General canvass

After the Electoral Commission has received the voting packages, it shall proceed to a general canvass which shall continue until completed. At that time, the unadjudicated and the protested ballots shall be examined and counted or rejected in its judgment according to law.

The general canvass of the election returns shall be conducted by using the Poll Certificates and every other document used in the course of the election. The Commonwealth Election Commission shall correct all arithmetical errors and shall count such tally sheet as it has been corrected.

. . .

The results of the canvass of an election, as declared by Commonwealth Election Commission and published by the General Administrator of Elections, shall be final, unless contested within the terms provided by this subtitle.

§3269. Election returns

The Commission shall declare the candidate receiving the highest number of votes for each office duly elected thereto, and shall issue a certificate of election to said candidate as evidence thereof.

* * *

§3274. Contesting the election

Within five (5) days following the date of service of the election certificate of each position in the general canvass, any candidate who contests the election of another candidate shall file a brief with the Board, stating, under oath, the ground or grounds thereof, which must be of such nature that, if proved, would suffice to change the result of the election.

A true, exact copy of the brief, together with a blank form of the service of notice obtained at the Board, shall be delivered in person, in the manner provided hereinafter, within five (5) days following its filing.

Within five (5) days following the date of receipt of the notice of the brief, the person whose election is contested shall have to file with the Board an answer, under oath, to the contestant's brief and shall send him or his counsel a copy thereof, provided, that if no answer is received within such term, it shall be construed that he accepts such contest as true.

. . .

§3275. Effect of contest

The filing of an action with the Board contesting the returns of an election shall not prevent the person from being certified as elected and taking and performing the duties of his office. In the case of senators and representatives, if a contest brief has been filed on time, the election of the contested candidate shall not be certified until the Board resolves said contest, which shall be done no later than the first day of January following a general election or sixty (60) days following a special election.

In case of the election of candidates for office other than senator or representatives, if a partial or total contest of the voting originates between two (2) or more candidates for an office or offices, and the Board should be unable to decide which of them was elected, it shall order a new election at the precinct or precincts affected, to be held under the regulations that it may prescribe.

* * *

APPENDIX F

COMMONWEALTH ELECTION COMMISSION

SAN JUAN, PUERTO RICO

CERTIFICATE

I, Ramón Ruiz Roche, Secretary of the Commonwealth Election Commission, do hereby Certify:

That at a Special Session held November 12, 1980 Electoral Commissioner of the Popular Democratic Party, Lic. Hector Luis Acevedo, presented a Motion to the effect that in the cases where the voter casts his vote by exclusively making a mark above a party's insignia on the edge of the square where it is found, said vote be counted in favor of the insignia thus marked, because it is deemed that it shows the voter's intention.

The Electoral Commissioners of the Puerto Rican Independent Party and the New Progressive Party believe that the Law should be applied as it reads and declare said ballots to be void. The Electoral Commissioners of the Popular Democratic Party and the Puerto Rican Socialist Party voted in favor that the Rule be construed as proposed.

The General Elections Administrator, Lic. Gerineldo Barreto Pérez, in view of a tie in the vote, considers that the Electoral Law has provisions covering this situation for which reason it should be applied in the sense of declaring said ballots void.

At the request of the interested party, this Certificate is issued.

At San Juan, Puerto Rico, on November 14, 1980.

/s/ RAMÓN RUIZ ROCHE
Commonwealth Election Secretary

APPENDIX G

COMMONWEALTH OF PUERTO RICO

Electoral Review Board

Case No. RB 80-268

Adjudication of Ballots

POPULAR DEMOCRATIC PARTY, *Appellant*,

v.

GERINELDO BARRETO PÉREZ, Administrator, Commonwealth Election Commission, *Respondent*.

ORDER

Appellant, Popular Democratic Party, has filed with us an action for the adjudication of ballots in which it alleges that the Commonwealth Election Commission has refused to adjudicate in its favor eight (8) ballots cast by voters who made an affirmative mark (x) above the square where its insignia is placed. It further alleges that the clear intention of these voters was to vote straight for the Popular Democratic Party and that the provision contained in Section 1.033(b) of the Electoral Law[1] violates the guarantee of the equal, universal and direct vote of Article II, Section 2 of the Constitution of Puerto Rico.

We have carefully examined the eight (8) ballots submitted in evidence by appellant and the same show that the intention of the voters to vote for the Popular Democratic Party is clearly expressed. In the case of *Puerto Rican Socialist Party*, Petitioner, Case No. RB 80-266, decided by this Board on November 14, 1980, a situation similar to the present one was involved. We decided therein, based on the letter of the law and on agreements adopted by the Commission, that marks placed outside the columns of the

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[1] Act No. 4 approved December 20, 1977.

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parties shall be deemed unmarked. In said case, however, no constitutional question was raised as in the present case.

There is no doubt that the intention of the eight (8) voters in this case was to vote for the Popular Democratic Party. However, they placed their marks outside the space where the insignia of that party appears and the Electoral Law expressly provides the following:

> "Section 1.033. Voting System
>
> (a) . . .
>
> (b) . . . Also, if the handwritten ballot is used, it must guarantee that the elector may vote by making any affirmative mark in the space under the printed insignia or device of the party, or within the square in which a candidate's name appears. *Any mark placed outside of said space or square shall be null and void, and deemed unmarked.*" (Underscore ours.)

In view of this clear and precise provision, not subject to interpretation, our function as members of this Board, is to apply the same, notwithstanding that our position may be contrary to that of the legislature in cases such as this one and of the *Puerto Rican Socialist Party* case, *supra*. Our functions, as members of the Board, do not include our questioning the statute, the provisions of which we must implement.[2] We must therefore uphold the validity thereof.

For the reasons stated we deny appellant's petition in this case.

Be it recorded and Notified.

Given at San Juan, Puerto Rico, on November 17, 1980.

Electoral Review Board

*Roberto Schmidt Monge
President

* Dissents on the grounds stated in the case of Puerto Rican Socialist Party, Case No. RB 80-266.

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[2] See Am. Jur. 2d Sec. 185.

**/s/ MYRTA IRIZARRY RÍOS
ASSOCIATE MEMBER

/s/ BENIGNO DAPENA YORDÁN
Associate Member

NOTICE

I hereby certify that on November 18, 1980, I personally served copy of this Order and Concurring Opinion (Case No. RB 80-268) to:

1) Lic. Gerineldo Barreto Pérez Administrator
2) Lic. Eugenio S. Belaval Electoral Commissioner NPP
3) Lic. Héctor Luis Acevedo Electoral Commissioner PDP
4) Lic. David Noriega Rodríguez Electoral Commissioner PIP
5) Lic. Ludmilia Rivera Burgos Electoral Commissioner PSP

In the Commonwealth Election Commission, Valencia Bldg., Hato Rey, Puerto Rico.

**Enters separate Concurring Opinion.

COMMONWEALTH OF PUERTO RICO

Electoral Review Board

Case No. RB 80-268

Adjudication of Ballots

POPULAR DEMOCRATIC PARTY, *Appellant*,

v.

GERINELDO BARRETO PÉREZ Administrator Commonwealth Election Commission, *Respondent*.

CONCURRING OPINION

In Puerto Rican Socialist Party, Petitioner, Case No. RB 80-266, decided last Friday, November 14, 1980, we held that adjudication to the party of votes where the mark was made by the voter in the square next to the names of Juan Mari Bras and Carlos Gallisá, said square being under the column of *independent candidates* and the column of *direct nomination*, was not in order. The Electoral Law,[1] as well as its Rules,[2] so provide.

We added in that case that the object pursued by the pertinent provisions of the Electoral Law is to establish a method so as to give the system stability, confidence and certainty. Likewise, the Supreme Court established in the case of P.D.P. v. General Elections Administrator, November 14, 1980 at p. 5, that "upon reflecting on the juridical values

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[1] Act No. 4 of December 10, 1977, Sections 1.03(b), 5.011, 5.012, 5.031.

[2] Rule 61 of General Elections Rules approved August 15, 1980. Subsequently amended pursuant to Act No. 3 of September 8, 1980; Manual of Procedure for Poll Officials and Coordinators of Electoral Unit for 1980 General Elections, VI, R. 82.

underlying this law we note that the legislative scheme stems from three important premises: (1) that the standards and rules referring to any electoral contest *and the manner of counting the votes* should be previously established so that all the candidates and political parties be aware of what to expect; (2) that no subsequent changes be introduced as may adversely affect such rules granting impermissible advantages to some over others; and (3) . . . ." (Underscore ours.)

In the present case it is alleged that Section 1.033(b) is unconstitutional. Associate Member, Lic. Benigno Dapena Yordán, maintains that our functions as members of this Board do not include our questioning the constitutionality of the statutes whose provisions we must implement.

I dissent from his position because it is the duty of this Board to watch over and preserve the constitutional rights of the voters.[3] *Administrative Invalidation of Statutes*, 66 Calif. L. Rev. 180 (1978). Furthermore, considering the constitutional question raised by petitioner, the same is frivolous and without merit. The provision of Section 1.033(b) is the same for all voters, political parties and candidates. It is neither unreasonable nor does it establish a suspicious classification.

For the reasons stated, I concur with the result.

Be it recorded and notified.

Given at San Juan, Puerto Rico, November 17, 1980.

ELECTORAL REVIEW BOARD

/s/ MYRTA IRIZARRY RÍOS
Associate Member

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[3] Section 2.001 (2), (10).

APPENDIX H

BEFORE THE SUPREME COURT OF PUERTO RICO

0-80-635

PUERTO RICAN SOCIALIST PARTY, *Appellant,*

v.

STATE ELECTIONS COMMISSION AND GENERAL ELECTIONS ADMINISTRATOR, *Appellees.*

0-80-646

POPULAR DEMOCRATIC PARTY, *Appellant,*

v.

STATE ELECTIONS COMMISSION AND GENERAL ELECTIONS ADMINISTRATOR, *Appellees.*

0-80-645

PUERTO RICAN SOCIALIST PARTY, *Interventor-Appellant,*

NEW PROGRESSIVE PARTY, *Appellees,*

v.

STATE ELECTIONS COMMISSION AND GENERAL ELECTIONS ADMINISTRATOR.

0-80-647

POPULAR DEMOCRATIC PARTY, *Interventor-Appellant,*

v.

STATE ELECTIONS COMMISSION AND GENERAL ELECTIONS ADMINISTRATOR.

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0-80-658

POPULAR DEMOCRATIC PARTY, *Interventor-Appellant,*

LUIS A. FERRE, ORESTE RAMOS, *et als, Appellees,*

v.

STATE ELECTIONS COMMISSION AND GENERAL ELECTIONS ADMINISTRATOR.

0-80-664

PUERTO RICAN SOCIALIST PARTY, *Interventor-Appellant,*

LUIS A. FERRE, ORESTE RAMOS, *et als, Appellees,*

v.

STATE ELECTIONS COMMISSION AND GENERAL ELECTIONS ADMINISTRATOR.

Mr. Justice Negrón García delivered the opinion of the Court.

San Juan, Puerto Rico, this 2d day of December, 1980.

Preliminary Principles:

The true solution of the various issues raised in the above captioned appeals[1] needs a short reference to various common electoral principles of constitutional, statutory and administrative nature that serves a conceptual background to the beliefs — and rights claimed. Also the examination, although superficially, of the organizational structure and of some postulates of importance in which the dynamics of suffrage is inspired, points to and develops, under the present Electoral Law of Puerto Rico — No. 4 of May 20, 1977, as amended. (16 PRLA Secs. 3001, et seq.)

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[1] For a faster expediency, said cases were consolidated. For a better understanding the cases do not follow a strict of filing but a more elaborated one based on issues.

The Constitution of the Commonwealth of Puerto Rico, in Art. II Sec. 2, deliberately acknowledges, recognizes the right to "universal suffrage, equal, direct, secret . . . ." Thus, the indelible imprint of the higher postulate emerging in the Preamble that emphasizes the democratic character of our society, where the political power emanates from the People and is exercised according to the will manifested thru the polls, is marked. This mandate is complemented by the provisions about the equal protection under the laws and the safeguard against discrimination for political reasons. Also of constitutional lineage is the emple power invested upon the Legislature to regulate the electoral process.[2]

Within that margin, we have recognized as legal and urgent all regulations that, without destructing the vote unnecessarily — tent to the fulfillment (achievement) of an electoral process just, orderly, honest and with integrity. *P.S.P., P.D.P. and P.I.P.* v. *Romero*, res. of 0ctober 21, 1980; *N.P.P.* v. *Electoral Court*, 104 (PRR) DPR 741 (1976).*

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[2] Daily Sessions of the Constituent Assembly, 1402-1403, 2074, 2621 (1961)

Article VI, Section 4, reads as follows:

General elections shall be held every four years, on a day of the month of November determined by the Legislative Assembly. In said elections, the Governor, members of the Legislative Assembly and other officials whose elections on that date shall be ordered by law.

Every person that has reached eighteen years; and meets the rest of the requisites determined by law, shall be an elector. Nobody shall be deprived of the right to vote because he or she does not know how to read or write, or does not possess property.

Everything concerning the electoral process and the registration of electors shall be provided by law, as will be that related to the political parties and candidacies.

Every official running for office shall be elected by direct vote and the candidate for an office who obtains a larger amount of votes that any of the other candidates for said office will be declared elected.

* Volume 104 has not been translated.

In the attainment of these plans of action, the establishing of uniform rules and regulations that propiciate the stability, trust and certainty regarding the correct adjudication of every ballot, is essential. *PDP and PSP* v. *Barreto Pérez*, res. of November 14, 1980. The legislative power to regulate nor the right to the suffrage can operate under a scheme of arbitrary legislative provisions or unrestricted inducements of electors, which are not values to be implemented in absolute terms.

The Electoral Law approved in 1977 creates an organism named Commonwealth Election Commission, whose basic administrative and decisional structure responds to a vision of a political contentious[3] electoral system in which three outstanding points are detected: (1) imposes upon the political parties the responsibility of organizing and inspecting all the proceedings of electoral nature that will rule or govern the electionary processes; (2) that the formulation and implementation of that mandate be achieved by way of the unanimous consensus of the parties; and (3) that because of this process, mutual party fiscalization be enforced.

Our Constitution and Electoral Law admits that the participation of the political parties is essential for the democratic system. Without said participation it would be very difficult to start the governmental apparatus in an election. As we said in *Dávila* v. *Secretary of State*, 83 P.R.R. 180 (1960):

> "Bruce explains that one of the severe lessons to be learned in a democracy is that no automatic devices, least of all constitutions, charters, and laws, can permanently insure the efficiency and effectiveness of popular government. For these, many forces must be set in motion outside the constitutional framework to effect that vital connection between the people and their governing agencies. It is through political parties that not

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[3] Schmidt Monge, R., *Puerto Rican Electoral Law*, Rev. Jur. C. Abog. Vol. 40 No. 4, 535, 541 (1979)

only public opinion is translated into action but that a continuous connection between the governing authorities and the members of the state is maintained. Parties have ever been outside the framework of government, yet they have constituted the blood and flesh and nervous system of it. Apart from a sound and active public conscience, apart from the moral and political education of the people, apart from the instruments of publicity — press, radio, and platform — which combine to keep people united and informed, one factor has been recognized from the beginning as absolutely essential to efficient democracy: it is the modern political party."

Now then, even though the enormous importance of the political parties, it does not detract from the fact that they are a means and not an end. The principal guarded subject of the modern constitutional-electoral architecture is the individual elector. The party is not the utmost element, but a vehicle of individual expression that adds itself to others in order to lead to the desired result and make feasible the collectible citizenry expression. Thus, all laws at the present time, regulating the electoral franchise have moved towards the recognition of the prevailing of the citizen's electoral rights *above all the rights* and prerrogatives of *all* parties and political groups." Art. 2.001 (11) 16 P.R.L.A. Sec. 3051(11). At the end, this individual right is the true and real consignee and receiver of the system. Herefore, it is of unquestionable public interest to protect it against possible unjustice that, from time to time, may be generated by the skirmishes due to the interests of the parties.

To that effect, as custodian and representative of the individual and public interest, before the absolutely partisan political interest, the legislator establishes the office of General Administrator of Elections appointed by the Governor from a list submitted by some Nomination Consulting Boards, with the advice and consent of the Senate and the president of the Commonwealth Election Commission. The General Administrator of Election "shall be

responsible to the People for the implementation and direction of the electoral procedures within an atmosphere of absolute integrity and impartiality . . . ." In discharging this task he has "the power, attributes and prerogatives *inherents* to the office", among which the following are (1) "planning, directing and supervising all the electoral proceedings held pursuant to the provisions of the law and regulations"; (2) "selecting, recruiting and appointing the personnel" needed to carry out the purposes of the law, including "recruiting or contracting watchmen and special guards on an election day"; and (3) "taking any other necessary and appropriate actions to implement the law." Arts. 1.007, (a), (b) and (m); (16 P.R.L.A. Sec. 3007, (a), (b) and (m). Together with said officer, the Commonwealth Election Commission — composed of Electoral Commissioners and their Alternate Commissioners appointed by the Governor upon petition of the central directing body of each party — is the body responsible for organizing and supervising all electoral procedures pursuant to the law and its regulations." Some of their duties are "designing an integral plan directed towards greater efficiency, promptness and the solution of all electoral, matters and procedures;" to deal, investigate, and *resolve* matters of its original jurisdiction (competence); to approve and adopt the necessary rules and regulations. Briefly, the Commission has administrative functions, quasi-legislative and quasi-judicial. Arts. 1.012 and 1.013 (16 P.R.L.A.) Secs. 3012, 3013.

The formula and mechanical of voting prescribed by law remits initially the decisions of the Commission to the unanimous of the votes of the Electoral Commissioners present. If there is not an unanimous vote, the matter "shall be decided, for or against by the Administrator . . . whose *decision* shall be considered as the Commonwealth Election Commission's and may be appealed. Art. 1.014(e) (16 P.R.L.A., Secs. 3014(e). Said appeal shall be filed before the Board, made up of three members of said administrative body. The Board's decision may bring an appeal for review

before this Supreme Court. Arts. 1.023 and 1.024 (16 PRLA, secs. 3023 and 3024). It is easy to become aware of the extensive powers and delicate responsibility that devolves upon the General Administrator as the *only* key figure representing the public interest in the Commission. The importance of deciding with equanimity, impartiality and juridicity is emphasized inherently political malieu in which positions are assumed and adopted on matters of importance and of partisan impact. In these matters it is inevitable the individual votes of the Commissioners respond exclusively to considerations of partisan advantage.[4]

By its nature, current elemental administrative principles apply to to the Commission. Such principles as, that the regulations adopted to implement the execution of the law may be complementary but not in conflict with the law -*Ex Parte Irizarry*, 66 P.R.R. 634 (1946); that unless the regulations are null and void *per se*, they create a state of law that protects those who act according to their dictates -*Aparicio* v. *Peñagaricano, Adm.*, 84 P.R.R. 386 (1962); that regulations or administrative conduct that is clearly in conflict with the law is null. *Infante* v. *Board of Medical Examiners*, 84 P.R.R. 296 (1961).

According to the philosophy and structure created by the law, the parties are not only represented on the Commission but they also exercise an effective primary control of the electoral system. The Electoral Commissioner is seen as the person who serves the interest of his or her party and serves as liaison between his party and the administrator and

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[4] The memorandums before our consideration illustrate this point. We are aware that, depending upon electoral advantage that, depending upon electoral advantage that be obtained by determined allegation of error or type of interpretation, the political parties before us will offer for consideration, without regard to previous antagonistic or inconsistent positions adopted in previous memoranda, a strict or liberal view, the applicability or not of laches and the like.

electors. In accordance with this design, we have recognized for a long time that the presence, with full voting privileges, of a representative of each political party, ". . . is a question of fair play or an additional guarantee of an honest and impartial election . . . ." *Martínez* v. *Insular Board of Elections*, 43 P.R.R., 395, 399 (1932). Conceived the purpose of the Commissioners in such a manner, a Commissioner cannot affect ignorance and pay no heed to agreements reached and valid rules adopted previously by unanimity. It is clear, however, that it is possible to bring to the attention of the commission *bona fide* discrepancies in interpretation or scope of an agreement or rule so that it may act affirmatively. However, it must be borne in mind that in order to evaluate the electoral requirements set for political parties, "the same measuring stick must be used in both cases". *Martínez* v. *Insular Election Board*, 43 P.R.R. 395, 404 (1932).

Taking into account the above expressed purposes, we shall examine the arguments set before us.

II

WRITS

0-80-645, *Puerto Rican Socialist Party* v. *New Progressive Party and Electoral Revision Board* v. *Barreto Pérez, Administrator and State Electoral Commission.*

* * *

III

APPEALS

0-80-635, *Puerto Rican Socialist Party* v. *Commonwealth Election Commission and its Administrator Gerineldo Barreto Pérez*;
0-80-646, *Popular Democratic Party* v. *Gerineldo Barreto Pérez, Administrator and Commonwealth Elections Commission.*

Revision 0-80-635 originates in an agreement adopted by the Commonwealth Elections Commission overruling a request made by the Puerto Rican Socialist Party (P.S.P) so that various ballots in which the elector made the mark in the square next to the names of Juan Mari Bras and Carlos

Gallisá be adjudicated to them. Said marks appeared under the direct nomination column, as illustrated by the ballots identified as Sample A — reduced scale and Sample B — standard size in the Appendix.

Appeal 0-80-646 comes from a denial issued by the Commission in answer to a petition from the Popular Democratic Party (P.D.P) that the votes cast by electors who made a mark on top of the square corresponding to said party be adjudicated as valid. This situation is illustrated by Samples C and D in the Appendix.

The Commission, by virtue of the decisions of the Administrator, applied in both cases, with obvious rigurosity, Section 32 entitled, Valid Marks — appearing in the Manual of Procedures for Polling Places Officers and Coordinators of Electoral Units — that regarding the appropriate matter provides "any mark of the ones considered valid that were not names or initials which appeared on the blank spaces for open nomination or other spaces outside the column for the parties will be considered as not made." Consequently, said ballots were declared invalid.

Not satisfied, the P.S.P. as well as the P.D.P., in separate appeals, resorted to the Electoral Review Board pointing out in summary, that the Commission erred by interpreting restrictively the law against the Constitution and the case *Aldarondo Galván* v. *Commonwealth Elections Board*, 100 P.R.R. 1079 (1972).

In the case of the P.S.P., through a divided vote[9] the Board affirmed the Commission on the following grounds:

> "This provision covers both situations presented in this petition. The mark is valid, in this case an (X), must have

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[9] Its President, Mr. Roberto Schmidt Monge, voted against because he considered this was a restrictive interpretation, referring to *Aldarondo Galvan* and alleging that Section 32, transcribed before was added to Rule 61 of the 1980 General Elections Regulations without any legal basis.

been placed *totally* in the column for direct nomination of the column for independent candidacy.

According to the criterium expressed before, these marks are considered as not made. However, if the name were written or the initials of a candidate or other person, the intention of the elector is clearer and in that case the vote is adjudicated according to that intention. As can be gathered from the above, the vote is not considered invalid. It can retain its vality regarding other marks, but those made outside the columns for the parties will be considered as not made.

The provisions of the electoral law concerning the format, design and contents of the ballot as well as the order of candidatures seeks to establish a method to assure stability and certainty to the system. Likewise, there will appear printed on the ballot, first the names of the candidates indicating the position they run for of that party whose candidate for governor would have obtained a majority of votes in the preceding general election, it will continue with the party which obtained second place and so on. Next appear the candidates for the parties by petition, in the order in which they have had completed their registration, and afterwards *the independent candidates, if there were any*. At the end the ballot provides blank spaces for each elective position where the electors, if they wish, can write the names of candidates whose names do not appear printed on the ballot. (Column for direct nomination — write in.) Both columns in those ballots have a purpose established by law which is not to receive votes by marking votes favoring candidates whose names appear on the ballot under the column corresponding to their party.

Apparently the rule is in most parts of United States that the vote does not count for a candidate if the mark is placed outside the space provided by law. The nullity of the act has been affirmed if the elector places the mark in a blank provided in the ballot so that the elector write in the name of any other candidate who does not appear in the preceding columns of the ballot.

The contention on the defect in the design of the ballot has no legal support. The ballot has space to the right and left of the names of the candidates. We have carefully examined same and it has sufficient space on both sides of the names of both candidates for the corresponding mark. Besides the law allows that the valid mark be under, over, to the side or on the same emblem of the candidate." [footnotes omitted] (emphasis ours).

Regarding the case of P.D.P. the Board also confirmed the Commission reiterating:

> "We have carefully examined the eight (8) ballots submitted as evidence by the plaintiff and in same the intention of the electors to vote for the Popular Democratic Party is clearly evident. In the case of the Puerto Rican Socialist Party, petitioner, case No. JR-80-266, solved by this Board on November 14, 1980, it dealt with a situation similar to the present one. In same, we determined, based on the law and the agreements reached by the Commission, that the marks placed outside the columns for the parties would be considered as not made. In said case, however, there were no constitutional contentions as in the present one.
>
> There is no doubt that the intention of the eight (8) electors in this case was to vote for the Popular Democratic Party. However, they made the mark outside the space where it is printed the emblem for that party. . . ." (Emphasis ours)[10]

They resorted to this forum and presented again said arguments.

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[10] Once again the President of the Electoral Review Board, Mr. Roberto Schmidt Monge, voted against for the same reasons of the case of the P.S.P. The Associate Member Mrs. Myrta Irizarry Rios submitted a concurrent vote evidencing her dissent with Associate Member Mr. Benigno Dapena, concerning the authority of the Board to judge on the constitutional contentions. Her position is that the Board has that Authority and duty.

To clarify, it is necessary to establish that the decision of *Aldarondo Galván, supra,* is not authority nor precedent that *automatically* rules for the solution of these cases. Same was solved under a statutory provision that is no longer in effect and that as legislative guideline it stated, for cases dealing with controversial ballots, that in "case of doubt, the designation on the ballot should be considered valid in a way that always comes out the intention of the elector, even though the designation is defective, the ballot will be valid and effective." See 63, Law of June 25, 1919 (16 L.P.R.A. Sec. 22 in fine.)

That disposition is no longer in effect. The rule of hermeneutic bequeathed by the Legislature presently appears in Article 1.033(b) that states:

> "The rules adopted by the Commission to implement any of the voting systems it deems necessary, will provide for a secret balloting that does not concede advantages or impose disadvantages to an political party or candidate, do not produce onerous conditions to any elector or group of electors. Likewise, if the vote is cast manually, the elector should have the guarantee that he can vote making *any affirmative mark* within the space where the party emblem appears printed or *within the square where the name of the candidate appears. Any mark outside of said space* or square will be null and will be considered as not made. (16 L.P.R.A. Sec. 3033(b).) (Emphasis ours.)

In stating the outlines of this disposition of law, distinctly from the other compelling state interests exposed by the law, we find that it pursues the *specific* governmental interest — cognoscible and of high hierarchy in the mature development of our democracy — of our democracy — of imprinting certainty and reliability to the vote awarding phase, precluding the generation of sterile controversies *as to which really was the true intention of the elector.* It is not the purpose of this article to lay down a precept against fraud. The stage and situation covered is the ruling and easy detection of the mark made by the elector and to which

candidate's advantage was it awarded. To that effect the legislative technique chooses to annul any mark outside the corresponding squares of the party's emblem or of its candidates in particular. As corollary, the awarding of a mark inside those squares is above discussion.

Certainly the constitutional capacity which we have acknowledged the Legislature in the past as to the regulation and order of electoral proceedings within parameters determined by our Constitution, comprehends the mode, manner and mechanism of how the intention and will of the elector is evidenced, shaped and shown. Now, our mission in such cases is to comply with the command of the law, acknowledging that the legislator cannot anticipate all the imaginable possibilities into which the human dynamics unfolds. In those instances, our supreme mission is to save — for the sake of the preeminence of the right involved — such situation in which a literal and rigurous interpretation would pose grave interrogatives and objections of constitutional character. So, when the legal text refers to and is configured in *absolute terms,* it is necessary for us to do an effort as to avoid constitutional shock, indeed by validating and accommodating it so that it can be obtained satisfacorily, harmony between the governmental interest involved and the primary aim of the suffrage.

In this way it is orienting that the very Electoral Commission recognized in paragraph 32 of the "Handbook of Proceedings for Polling Place Officers and Electoral Unit Coordinators.", unanimously approved before November 4, 1980 titled as "Criteria for Determination" that would be considered as valid any cross (X), check mark (✓), point (.), dash (-), circle (O), or variants of those, clearly distinguishable, that reflects the intention of the elector.[11] For

---

[11] Article 1.003 (22) defines the concept *mark* as any type of affirmative expression by the voter on the ballot. (16 L.P.R.A. sec. 3003(22).

the search of that intention, said organism also disposed the following determination criteria:

"Any valid mark that appears within a party's column in the area corresponding to the party's emblem, be this mark: below, above, to the side or over the same emblem will mean a vote for all the candidates of that party for the corresponding precinct, excepting any other candidate who loses the vote because elector marked another candidate of a different party, as was explained before under criteria for determining mixed vote.

"To *determine the intention of the elector* when marks touch other columns or other candidates within the same column or that of a different party, the following criteria may be considered:

"When two marks in form of a cross (x) that could touch or pass to another column, the point where the two lines meet will be taken to show the intention of the elector. The same will be said as to the check mark (✓) that touches or passes to another column: the point where both lines meet will be taken *to fix the intention of the mark*. In the case of marks made in the way of lines, the origin point will be taken as to determine the intention of the mark (_____) if it is clearly distinguishable.

"Ballots that appear erased or crossed out under an emblem, and marked under another, with be considered as "protested" for double mark.

"If it's the candidate's name that's crossed out, it will also be protested. Ballots appearing with names written on the front or back, that do not belong as names in the "Direct Nomination Column" (write in)* *or initials different to those belonging to the inspectors; or any word or phrase written, be it* in favor or against any candidate or party; or with any kind of drawing, marks or figures of any type not allowed as to convey a vote, will also be 'protested' (obviously, for this purpose it will

* In English in the original N. of T.

not be taken into account the writings or signatures of functionaries; which will appear on the ballots that have been object of the challenging process).

"*Any of the marks that are considered valid (not being names or initials) that appear in the blank spaces of direct nomination or in the other spaces outside the parties' columns will not be considered.*" (Emphasis ours).

In addition to these administrative regulations that proclaim the supremacy of substance over shape, that is, the intention of the elector over the type of mark, we find that the majority of the "Canvassing Rules" adopted by the Commission on November 19, are entended and liberal and tend to shape, as directing criterion, the prevailing of the elector's intention. Such view substitute in the *Special Regulation* adopted November 24 to determine the validity of certain marks made *outside* the quadrants or printed squares of the ballots and at times, for millimeters of impression, cross the black line which in the main quadrant borders all the ballots, penetrating the parties' or candidates' spaces.

Under these agreements, as illustrated by *Examples E and F of Appendix,* the Commission has been awarding ballots in favor of candidates Juan Mari Bras and Carlos Gallisá, even though the marks had been made outside their quadrant, but within the vertical columns of the PSP in the reater blank space provided under the quadrant containing the names and emblems of both, as the Appendix shows. Observe that a literal and rigurous interpretation of the statute and the original regulatory safeguards will invalidate these ballots. Nevertheless the Commission, congruously with the medular concern of the law to validate every vote in which the purpose can be clearly ascerted, is awarding them correctly, for the purpose of the vote is clear, even though the sign or mark results somewhat defective as to its location.

In identical spirit, by the Decision of November 15, it has been awarding ballots in the same way: (1) when the elector uses initials of political parties (PNP, PPD, PIP and PSP); and (2) when the elector writes the governation candidate's initials (CRB, RHC, RBM or LLH) or any initial that can be identified with a name in the ballot, being understood that such initials or the candidate's name are written on the space corresponding to the party's emblem, as an affirmative mark under such emblem: The same way, it agreed that the candidate's name on the ballot, written or not on the direct nomination column does not annul it. These situations represent living examples in which a restrictive implementation can invalidate ballots. Also observe in *Example G* other deficiently located marks which were inserted to the upper left margin *outside* the ballot, or in the inferior or superior edge, which by chance touch or pass the interior part of the ballot, which are equally awarded to the party or corresponding candidate corresponding to vote.

When evaluating our judicial conscience, such agreements deserve our approval. They surpass any constitutional objection, for it seems that the nullity criterion by reason of mark passing edge by a few centimeters, not being there controversy about the intention, would be arbitrary.

The same approach and results should prevail in the cases before us. The determining measure is if the mark reflects distinctly the elector's intention and not the fortuitous event of the mark being placed incorrectly.[12] As to the speculative arguments, that one of those who appear before this Court forwards meaning that the ballot marks involved are subject of being interpreted as protests — fear or subterfuge, and not by the evident intention of the elector voting in favor of those

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[12] This conclusion is sustained in Articles 1.034 (16 L.P.R.A. sec. 3034) showing that the Commissioner's ruling capacity should be exercised so that the rules be uniform and compatible among themselves.

candidates or parties, we submit the question to a simple visual examination of the ballots in the *Appendix* — and to the intelligence and common sense of the reader and the elector — as proof sustaining the reasonability of the conclusion — that the manifest intention of the involved electors was that of voting for PSP and PPD candidates. We reject, from the shape of the marks, the indication that those marks were put there as an elector's intention of identification.

The circumstance that in the open college system, in contrast with the closed system, there wasn't the opportunity to impart general and common instructions to the electors as to how voting reinforces the need for this interpretation. The voting event involves a population exceeding one and a half million of all kinds of persons, from the most diverse social, intellectual and academic classes and conditions. Under this point of view, we must remember the constitutional warning that: " . . . nobody shall be deprived from his right to vote for not knowing how to read or write. . . " Art. VI sec. 4. In its correct dimension this postulate conveys, in its various aspects, the prohibition to annul a vote in case that an elector doesn't follow instructions that only affect in a minimal way the legislative interest pursuant to the recognition of the elector's true will.

When taking this decision, we did not miss the force of the main argument of the Administrator in writ 0-80-646 in the sense that ". . . previsely the appellant's claims are those that in the implementation and upon prevailing the same, would conduct to a violation of the Equal Protection Clause in detriment of New Progressive Party and Puerto Rican Independentist Party and in the benefit of Popular Democratic Party and Puerto Rican Socialist Party. It is based in that the design and contents of the ballot, as we have visually appreciated, ". . . has two *more blank spaces* over the emblems of Popular Democratic Party and Puerto Rican Socialist Party outside the quadrant but *does not have* such two spaces over the New Progressive Party and Puerto Rican

Independentist Party and outside of the quadrant." The interventor, PNP, furthers this note stating that "it will be conceding an advantage of more space in the ballot to the candidates and emblems of some parties over others."

Thinking about the apparent merits of the argument we find that the logic of the reasoning is wholly on the contrary. Precisely, by not existing a blank space in the superior part of the quadrant where the emblems of PNP and PIP were drawn because they contain printed information identifying the Municipality, senatorial and representative districts, number of precinct and character of document, it is improbable, not saying altogether impossible, that electors favoring these two parties make their marks in that area. Only from a vertical perspective blank spaces susceptible of marking over the area outside the ballot square in PPD and PSP cases shows. From lateral left, the PNP is the only one that could benefit from such space having received in the Commission, as illustrated by *Example* G from the *Appendix* favorable interpretations and awards. That doesn't mean that it benefits from more space than other contestors. It only deals with the fortuitous and accidental characteristics in the way of printing the ballot, and by the multiplicity of situations, law demands it individually evaluated and awarded.

We have seen that these blank space areas also exist and that they motivated the controversy over candidature marks of Juan Mari Bras and Carlos Gallizá. They also generated agreements as to the convalidation or outside of the quadrant marks, but in the left side of the ballot, referring to PNP candidates (Examples E. F and G from Appendix). The given interpretation, in equal conditions to all parties, precludes unfair and greivous results to the elector.

To sum up, based upon a visual examination of the challenged ballots, joined together with the prevailing right of the electors over political parties, the high position of suffrage in our democratic society, and the expansive safeguards adopted by the Commission for other similar instances, it is inevitable to conclude that those ballots are valid.

We resolve that the *Review Board was mistaken*. The decisions taken by the Board should be revoked and writs (0-80-635 and 0-80-646) awarded — for being clear, manifest and uncontrovertible the intention of the electors — the controversial ballots corresponding to the PSP and PPD.

* * *

APENDICE

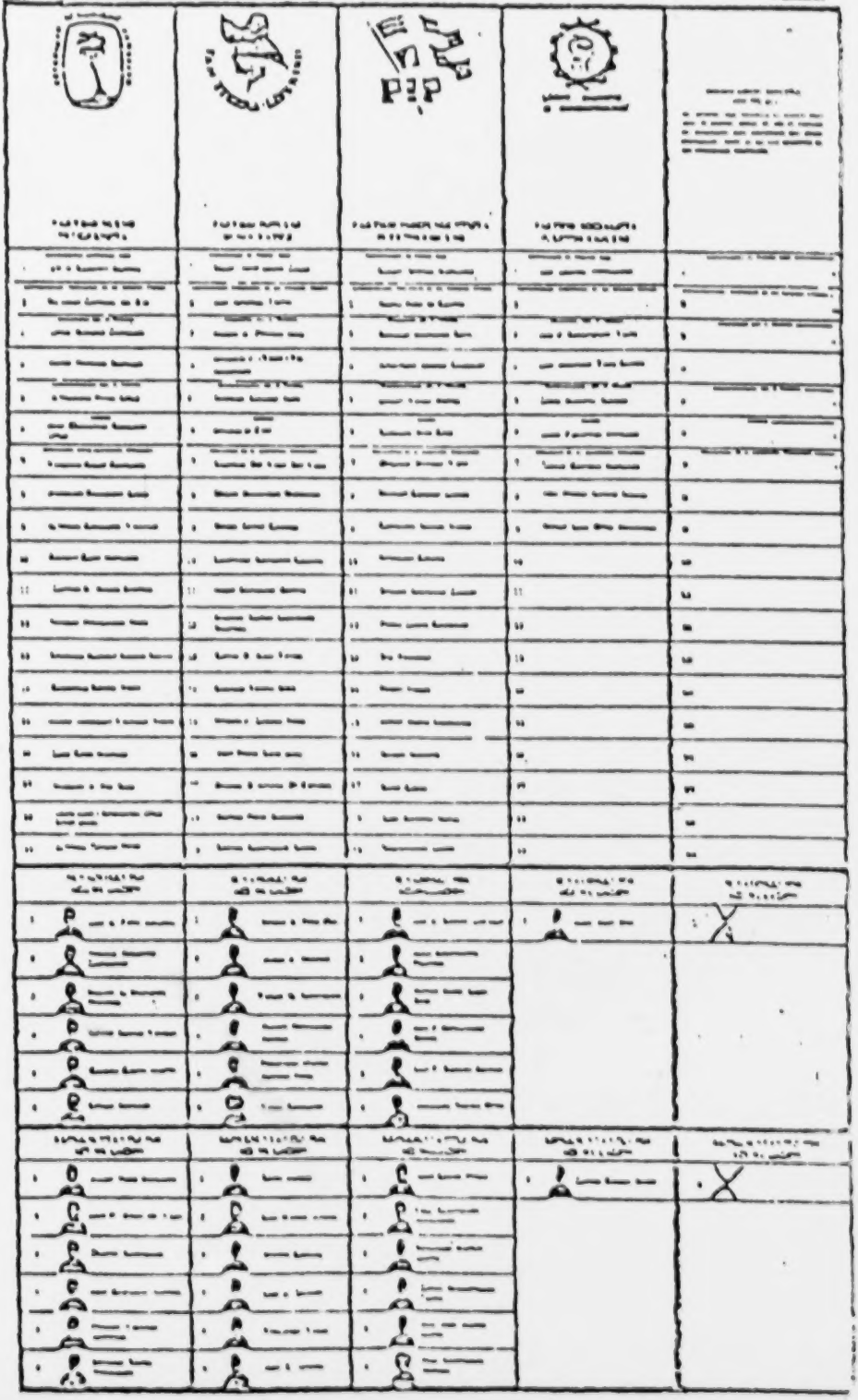
(0-80-635)

EJEMPLO A

MODELO

PAPELETA ELECTORAL

MODELO



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(0-80-646)

EJEMPLO C

MODELO

PAPELETA ELECTORAL

	Samuel Tarquito		
	15 Arlene Bayé		16
Ramón Figueroa	17 Paquita Pesquera Canteliops		17
Manuel Rodríguez	18 Angel Colón Feliciano		18
	19		19
Rivera Leon	20		20
Vargas Flores	21		21
Clemencita Escalona Marrero	22		22
Alberto Cedeño	23		23
SENADOR POR ACUMULACION	SENADOR POR ACUMULACION		SENADOR POR ACUMULACION
Luis Rivera Lacourt	1 Juan Mari Bras		1 X
Justo Echevarría			
Héctor René Lugo			
José [illegible] Hernández			
Luis Ramos Ramos			
Armandito Torres			
REPRESENTANTE POR ACUMULACION	REPRESENTANTE POR ACUMULACION		REPRESENTANTE POR ACUMULACION
[illegible] Torres	1 Carlos Gallisá		1 X
[illegible]			
Fernando Martín			
[illegible]			

COMISION ESTATAL DE ELECCIONES

ELECCIONES GENERALES

PAPELETA ELECTORAL

4 DE NOVIEMBRE DE 1980

SAN JUAN

Precinto Núm. 2

Distrito Representativo Núm.

torial Núm. 1

X

SEGURIDAD PROGRESO	PAN·TIERRA·LIBERTAD		¡La Oposición. Verdadera!	NOMINACION DIRECTA (WRITE IN)
PARTIDO NUEVO PROGRESISTA	PARTIDO POPULAR DEMOCRATICO	PARTIDO INDEPENDENTISTA PUERTORRIQUEÑO	PARTIDO SOCIALISTA PUERTORRIQUEÑO	Se provee esta columna en blanco para que el elector anote en ella el nombre de cualquier otro candidato que desee escoger, fuera de los que aparecen en las columnas anteriores. Artículo 6.011 Ley Electoral
Gobernador de Puerto Rico	Gobernador de Puerto Rico	Gobernador de Puerto Rico	Gobernador de Puerto Rico	Gobernador de Puerto Rico
os Romero Barceló	1 Rafael Hernández Colón	1 Rubén Berríos Martínez	1 Luis Lausell Hernández	1
Residente en los Estados Unidos	Comisionado Residente en los Estados Unidos	Comisionado Residente en los Estados Unidos	Comisionado Residente en los Estados Unidos	Comisionado Residente en los Estados Unidos
ucar Corrada del Río	2 José Arsenio Torres	2 Marta Font de Calero	2	2
adores por el Distrito	Senadores por el Distrito	Senadores por el Distrito	Senadores por el Distrito	Senadores por el Distrito
de Ramos	3 Cándida Martínez Benítez	3 Margarita Ostolaza Rey	3 José Rafael Cosa Pontón	3
		Isis Sánchez Longo	Pedro Balgés Chapel	4

EJEMPLO E

MODELO

PAPELETA ELECTORAL

MODELO

Miranda

2 Edwin Ramos Yordán

Calixto Calero Jiménez

Efraín Santiago

Luis A. Ferré Aguayo

Nicolás Nogueras Cartagena

REPRESENTANTES POR ACUMULACION

Osvaldo Torres Velázquez

Angel Viera Martínez

José Granados Navedo

Freddy Valentín Arévedo

Luis Ayala Del Valle

1 Víctor Rodríguez

2 Velda González Modestti

3 Sergio A. Peña Clos

4 Francisco (Fuco) Aponte Pérez

5 Justo A. Méndez

6 Miguel A. Hernández Agosto

REPRESENTANTES POR ACUMULACION

1 José Enrique Arrarás

2 Rony Jarabo

3 Luis Muñoz Arjona

4 Luis A. Dupuey

5 Severo E. Colberg

6 Fernando Tapia

1 Luis Rivera Lacourt

2 Justo Echevarría

3 Héctor René Lugo

4 José Juan Hernández

5 Luis Ramos Ramos

6 Armandito Torres

REPRESENTANTES POR ACUMULACION

1 Ariel Colón Pratts

2 Félix F. Rodríguez (Paky)

3 Fernando Martín

4 Carlos Mondríguez

5 Juan José Jiménez (Gungo)

6 Irma Rodríguez

1 Juan Mari Bras

REPRESENTANTE POR ACUMULACION

1 Carlos Gallisá

1951

EJEMPLO G

MODELO

PAPELETA ELECTORAL

MODELO

IN THE SUPREME COURT OF PUERTO RICO
SAN JUAN, PUERTO RICO

Case No. 0-80-664

PUERTO RICO SOCIALIST PARTY, *Interventor-appellant,*

LUIS A. FERRE, ORESTE RAMOS, *et al, Appellee,*

v.

COMMONWEALTH ELECTION COMMISSION AND GENERAL ADMINISTRATOR OF ELECTIONS.

JUDGMENT

San Juan, Puerto Rico, this 2nd. day of December, 1980.

Based on the reasons stated in the previous opinion, judgment is pronounced as to the following:

1. In the appeals for annulment 0-80-635, the resolutions issued by the Electoral Review Board in cases JR80-266 and JR80-268 were revoked, and, consequently, therefore, it is so ordered to the Commonwealth Election Commission to count as correctly cast votes for candidates Juan Mari Bras and Carlos Gallisá, all valid marks of affirmative expression of the elector's intention to vote for said candidates even though said marks were placed in the squares of the direct nomination next to the squares in which their candidacy appears in the ballot sheet, as well as those marks in the ballot sheet favoring the Popular Democratic Party in case JR80-268, and any others in which the intention of the elector may be inferred from a valid mark placed above the emblem of said party even when said mark is completely out of the line which encloses the candidacies in the ballot sheet. Mr. Chief Justice, Trías Monje and Mr. Associate Justice, Rigau, concur in the result and retain the right to express themselves separately.

2. On appeal 0-80-647 and 0-80-645 the appealed resolution is confirmed since it annuled that part of Rule 10 of the Election Regulation which allows the Commission to reach agreements by majority vote without the intervention of the General Administrator of Elections.

Also, the resolution of the other part related to the adjudication of the ballots from special guards is confirmed. Chief Justice Trías Monje and Associate Justice Rigau and Díaz Cruz dissent and would restablish agreement number 7 adopted by the Commonwealth Election Commission in November 12, 1980 for the purpose of not counting the ballots of the special guards who voted in a polling place different from the one in which they were registered.

3. On Appeals 0-80-658 and 0-80-664 the resolution issued by the Electoral Review Board in the consolidated cases JR-80-267 and JR-80-270, and, consequently, since Art. 5.034 of the Electoral Law is constitutional, it is so ordered to the Commonwealth Electoral Commission not to adjudicate the challenged ballots that were not answered. Mr. Chief Justice, Trías Monje and the Associate Justices Mr. Rigau and Mr. Torres Rigual concur with the decision. Mr. Associate Justice, Irizarry Yunqué disqualified himself and did not intervene in the resolution of cases number 0-80-658 and 0-80-664. Mr. Chief Justice, Trías Monje and Associate Justices, Mr. Rigau, Mr. Torres Rigual and Mr. Díaz Cruz retained the right to express their respective opinions separately.

So it is pronounced and decreed by the Court and certified by the Secretary.

(signed) ERNESTO CHIESA

Secretary

FILED
APR 8 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1540

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PARTIDO NUEVO PROGRESISTA, *Petitioner*,

v.

GERINELDO BARRETO PEREZ, Administrator, Puerto Rico Elections Commission,

and

PARTIDO POPULAR DEMOCRATICO, *Respondents*.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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April 8, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1540

PARTIDO NUEVO PROGRESISTA, *Petitioner,*

v.

GERINELDO BARRETO PEREZ, Administrator,
Puerto Rico Elections Commission,

and

PARTIDO POPULAR DEMOCRATICO, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I. SUMMARY STATEMENT OF THE PROCEEDINGS

The petition for a writ of certiorari requests that this Court review the decision of the First Circuit herein which reversed and set aside a decision of the United States District Court for Puerto Rico (Torruella, D.J.) entered in a case brought under 42 U.S.C. §1983. Judge Torruella granted relief to petitioner, directing that certain contested ballots in a local election should not be counted. In effect, he determined that the Supreme Court of Puerto Rico had wrongly construed the local election statutes and had wrongly

directed that the contested ballots should be counted in accordance with the conceded intent of the voters.

Neither the petitioner nor any other party to the Puerto Rican Supreme Court case sought review by this Court of the decision of the Puerto Rican Supreme Court.[1] Instead, petitioner sought to annul the decision of the Puerto Rican Supreme Court by this suit filed in the Federal District Court for Puerto Rico under 42 U.S.C. §1983 and 28 U.S.C. §1343(3).

Respondent appealed the Federal District Court's decision to the First Circuit which, after expedited hearing, reversed. (Petitioner's App. p. 1a). It held that the United States District Court for Puerto Rico had "erred in its conclusion" that "federal court intervention in this case" was permissible. It held that the present case was "inappropriate for federal court review in a civil rights action"; that it did not involve a question of "patent and fundamental unfairness"; that "it does not involve a state court order that *dis*enfranchises voters; rather it involves a Commonwealth decision that *en*franchises them" (italics in original). (Pet. App. p. 5a). Petitioner filed with Justice Brennan an Application for Stay and Recall of the First Circuit's Mandate, pending petition for certiorari. (No. A-601). Justice Brennan referred the Application to the full Court. It was denied on January 26, 1981. Petitioner nevertheless proceeded to seek certiorari for the purpose of overturning the judgment of the Supreme Court of Puerto Rico and obtaining a judgment of this Court which would invalidate 700 to 1,000

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[1] Review by this Court on certiorari to the Supreme Court of Puerto Rico is provided by 28 U.S.C. §1258.

ballots out of the approximately 1,700,000 votes cast[2] because, according to petitioner, the Supreme Court of Puerto Rico erroneously held that the Puerto Rican statute, properly construed, required that the contested ballots should be counted in accordance with the manifest and undisputed intent of the voters.

The Supreme Court of Puerto Rico reached its result on the basis of the Constitution of Puerto Rico, which provides that "no person shall be deprived of the right to vote because he does not know how to read or write" (Art. VI, §4; see also Art. II., §2 and Art. II, §7); various regulations of the Puerto Rico Electoral Commission which are designed to validate "the intention of the elector over the type of mark"; the configuration of the ballot which invited the voter error;[3] and the novelty of the 1980 election procedures which, under a newly enacted law providing for an "open" instead of a "closed" system, deprived voters of the opportunity which they previously had enjoyed for instructions as to casting their ballots;[4] and the inability of some voters to read or write.

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[2] Most of the challenged ballots were cast in close elections for the lower House of the legislature and several municipalities. It cannot presently be predicted, however, whether the validation or invalidation of those ballots will determine the outcome of those elections because of the pendency of contests on other grounds, pending before the Supreme Court of Puerto Rico and unresolved at the time of this writing.

[3] The ballot included a blank space *above* the insignia and column of the respondent PDP which invited voters who could not or did not carefully read the instructions to place their mark in that blank space instead of *under* the insignia. See Ballots, Pet. App. pp. 79a-85a.

[4] Prior to the present election, a "closed" system was used in Puerto Rico. Voters were required to assemble in designated poll-

The Federal District Judge held that the Puerto Rico Supreme Court's decision had resulted in a denial of petitioner's rights. He enjoined the Administrator of the Puerto Rican Elections Commission from counting any of the contested ballots. His decision was reversed by the First Circuit (*supra*), and it is the First Circuit's decision that petitioner requests this Court to review.

II. THE "QUESTIONS PRESENTED"

The petition for certiorari states two "Questions Presented", neither of which is presented by the decision of the First Circuit, and neither of which is an issue in this case.[5] The first Question Presented is "Whether the Due Process Clause requires that electoral laws be administered so as to provide fundamentally fair elections for public office". No such issue is presented. The First Circuit did not hold that the due process clause is inapplicable. The First Circuit, correctly applying the established law to the facts of this case, held that the case was "inappropriate for federal court review in a civil rights action, lest the

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ing places (schoolrooms, etc.); the doors were closed at a designated time; representatives of all parties instructed the assembled voters, including answering questions, as to the proper form for marking and casting the ballot, and voting then took place. The "open college system", inaugurated by the 1977 election law, is like the system familiar in the States, and made no provision for voter questions and instruction prior to their marking and casting their ballots. Only if requested to do so, may the poll inspector explain the voting procedure, according to the 1977 Electoral Law. See 16 L.P.R.A. §3239 (Supp. 1979).

[5] This Court's Rule 21.1(a) states that "Only the questions set forth in the petition or fairly included therein will be considered by the Court".

federal courts 'be thrust into the details of virtually every election' ". Among other factors, it pointed out that the decision of the Puerto Rico Supreme Court enfranchised and did not "disenfranchise" voters and that it did not deprive petitioner of voting rights.

The District Court had relied on the First Circuit's 1978 decision in *Griffin* v. *Burns,* 570 F.2d 1065, which had invalidated, on due process grounds, the election of candidates in a primary election for local office in Rhode Island. In *Griffin* a number of voters had been disenfranchised because official statements induced them to cast absentee ballots instead of voting in person, although the statute did not permit absentee voting. In the present case, the First Circuit, reversing the District Court, pointed out that the facts were fundamentally different. It stated:

> "We hold that the district court erred in its conclusion that *Griffin* v. *Burns* permitted federal court intervention in this case. In *Griffin* we held that the election process had reached 'the point of patent and fundamental unfairness,' and ordered a new election. Voters there had been told for many years that they could vote in a primary by absentee ballot, and such ballots had been furnished them by election officials in the challenged election. After the election they were told that their absentee ballots were void. Unlike *Griffin,* this case does not involve a state court order that *dis*enfranchises voters; rather it involves a Commonwealth decision that *en*fanchises them—plaintiffs claim that votes were 'diluted' by the votes of others, not that they themselves were prevented from voting. Moreover, in *Griffin,* had those casting absentee ballots known of their possible invalidity, many might have gone to the polls and voted in person. Here there was no such reliance

> upon an official interpretation of the local election law; no party or person is likely to have acted to their detriment by relying upon the invalidity of ballots with marks outside the ballots' drawn rectangles. For these reasons, we believe this case falls not within the purview of *Griffin* but within the area delineated by the Second Circuit, in *Powell* v. *Power,* 436 F.2d 84 (1970), as inappropriate for federal court review in a civil rights action, lest the federal court 'be thrust into the details of virtually every election. . . .' (*Id.* at 86)." (Pet. App. p. 5a).[6]

In its "Reasons for Granting the Writ", petitioner attempts to support this "Question Presented" by urging this Court to grant certiorari in the present case to "Overturn Its Decision In *Snowden* v. *Hughes,* 321 U.S. 1 (1944), Which Would Bar The Application Of The Due Process Clause To Ensure Fundamental Fairness In The Conduct Of Elections For Public Office. . . ." (Petition p. ii). This is, of course, a total misreading of *Snowden* v. *Hughes.*[7] *Snowden* held that the mere failure, even if erroneous or unlawful, of state officials to certify a candidate under state law, for purposes of a party primary election, does not, standing alone, give rise to a cause of action under §1983 or the due process clause. Snowden's claim was rejected because "There is no contention that the statutes of the state are in any respect inconsistent with the guaranties of the Fourteenth Amendment"; and no allega-

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[6] Circuit Judge Campbell, who was the Presiding Circuit Judge in the present case, wrote the opinion of the court in *Griffin* v. *Burns.*

[7] Similarly, at page 6, petitioner misreads *Snowden,* stating that it holds "that candidates for state office enjoy no protection under the Due Process Clause".

tion of an intentional or purposeful discrimination between persons or classes (321 U.S. at 7-8, 64 S.Ct. 397 at 400-401). The Court held that "an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not *without more* a denial of the equal protection of the laws" (*ibid.*). (Emphasis supplied).[8]

Petitioner's plea, although cast in the inappropriate guise of an attack upon *Snowden* v. *Hughes,* invites this Court to overrule the settled constitutional doctrine which restricts federal intervention in the electoral process to situations of "invidious, purposeful discrimination" or which are "endemic to the system", and excludes "the ordinary dispute over the counting and marking of ballots" (see *infra*). We submit that the Court should decline the invitation; and in any event, the present case, which involves the *validation* of voter intent, would be singularly inappropriate for

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[8] Petitioner quotes the passage in *Snowden* to the effect that "an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause" (Pet. p. 9). Neither this nor similar quotes elsewhere in the relevant cases supports petitioner's contention. The federal constitutional protection is an independent right, proceeding from federal standards. It is not a provision for supervising state procedures, prescriptions or decisions unless they are of a character and nature which violate federal rights.–The electoral process for state office is committed by our system to *state* administration. Only where it violates the special, fundamental federal guarantees is it subject to federal discipline. This is the doctrine of *Snowden* v. *Hughes,* which is reiterated in the body of case law in all circuits which have considered the matter. It is the principle which, as the First Circuit correctly decided, controls the present case and required dismissal of petitioner's federal complaint.

the purpose, as the First Circuit's opinion demonstrates.

The holding of *Snowden* v. *Hughes* and the distinction it draws between "intentional and purposeful discrimination" in state electoral processes and mere unlawful administration of state election laws, have been consistently followed in a large number of cases.[9] Like *Snowden,* decided cases in all circuits recognize the fundamental role of the Fourteenth Amendment in election cases, subject to the infinite variety of factual situations.[10]

The basic principle is well established in the First Circuit and was correctly applied in this case. It based its decision herein on the principles which it had summarized in *Griffin* v. *Burns,* 570 F.2d 1065, 1077 (1978)

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[9] See, *e.g., Powell* v. *Power,* 436 F.2d 84 (2d Cir. 1970); *Saxon* v. *Fielding,* 614 F.2d 78 (5th Cir. 1980); *Gamza* v. *Aguirre,* 619 F.2d 449 (5th Cir. 1980); *Hennings* v. *Grafton,* 523 F.2d 861 (7th Cir. 1975); and *Pettengill* v. *Putnam County R-1 School District, Unionville, Missouri,* 472 F.2d 121 (8th Cir. 1973).

Petitioner states that the lower federal courts "have not adequately resolved" the definition of "the due process right to a fundamentally fair election". Petitioner does not and could not assert that there is a conflict among the circuits which might invite review in an appropriate case (Pet. pp. 10-13; see "Questions Presented", and "Reasons for Granting the Writ" (Pet. i, ii).

[10] *Cf., Bullock* v. *Carter,* 405 U.S. 134, 92 S.Ct. 849 (1972). In that case, this Court sustained an action by candidates for local office in Texas, and held that a Texas statute requiring payment of fees ranging as high as $8,900 as a prerequisite for candidacy was arbitrary and unconstitutional. This requirement, resulting in unjustifiably excluding from the primaries persons unable to make the large payment, the Court held, is "endemic to the system" (405 U.S. at 144, 92 S.Ct. at 856) and "results in a denial of equal protection of the laws" (405 U.S. at 149, 92 S.Ct. at 859).

that "[t]he right to vote remains, at bottom, a federally protected right. If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under §1983 therefor in order. *Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots;* and the question of the availability of a fully adequate state corrective process is germane. But there is precedent for federal relief where broad-gauged unfairness permeates an election, even if derived from apparently neutral action". (Emphasis supplied).

The second "Question Presented" by petitioner is "Whether a post-election change in Puerto Rican electoral laws that retroactively alters the outcome of the election violates the Due Process Clause". This question is *not presented* by the present case. It is significant that it is stated but not discussed in the petition.[11] There was no "post-election change in Puerto Rican electoral laws"; there was a decision, pursuant to the relevant local statutes, by the Supreme Court of Puerto Rico on petitions challenging the action of the electoral authorities who, by divided vote, invalidated certain ballots. Presumably, petitioner is suggesting that because the decision of the Puerto Rico Supreme Court came after the election,

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[11] The *only* reference in the body of the petition is the following sentence (p. 15):

> "Candidates seek public office and citizens vote in elections with the central although unexpressed expectation that elections will be administered fairly—for example, that the electoral rules will not be reinterpreted or modified after a close election in a way that may be foreseen to change the outcome of the election."

it was "retroactive", unconstitutional and a violation of the rights of petitioner.–This is obviously untenable; judicial decisions construing election statutes and regulations determining the validity of ballots are necessarily rendered after the ballots are cast. Petitioner's contention would castigate all such decisions as "retroactive" and, therefore, an unconstitutional deprivation of the rights of the losing party.

To place the matter in perspective, it should also be noted that the decision of the Supreme Court of Puerto Rico, interpreting the statute so as to validate the manifest intention of the voters, was made in a case of first impression. The statutory provision in issue first appeared in the new Electoral Law of 1977. This was the first election held pursuant to its terms. The construction of the 1977 statute involved had never been considered by the Commonwealth Supreme Court nor by any other court prior to the present decision. The issue of the validity of the disputed ballots arose for the first time shortly after the November 4, 1980 general elections, during the recount conducted by the Election Commission. Its resolution turned on the construction which should be given to Article 1.033(b) of the 1977 Electoral Law, 16 L.P.R.A. §3033(b),[12] in the light of the entire statute, various of the Election Commission's regulations designed to validate "the intention of the elector over the type of mark", and the constitutional provisions guaranteeing equal protection and particularly the provision of the Constitution of Puerto Rico stating that "no person shall be deprived of the right to vote because he does not know how to read or write . . . ." Art. VI, § 4.

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[12] This provision required that the voter's mark must be placed *under* the printed insignia or device of the party.

The election officials ruled the ballots invalid. On petitions for review filed by the Puerto Rico Socialist Party and by respondent PPD, the issue as to the proper construction of Article 1.033(b) came before the Supreme Court of Puerto Rico. The issue was one of first impression. It had never been considered or decided by any court prior to the court's decision here involved, on December 2, 1980.

Most of the disputed ballots here in issue were marked by voters intending to vote for the candidates of respondent PPD, who placed marks *above* the insignia of that party instead of below it. As the Court of Appeals states, this occurred because the ballot was so constructed that the PPD was the only major party with a blank space above its ballot heading. A similar situation existed with respect to the minor Socialist Party, and the decision of the Supreme Court of Puerto Rico validating such ballots applied equally to that party's candidates and to mismarked ballots of all other parties whenever the intent of the voter is clear.

III. THE FIRST CIRCUIT'S DECISION IS CORRECT

The present case is nothing more than an attempt to persuade the federal judiciary to override the Supreme Court of Puerto Rico's interpretation of local law which gives effect to the undisputed intent of the voters and validates the ballots cast by many citizens in the 1980 general elections. In essence, the contention of petitioner PNP is that it is a violation of due process to construe and apply local law so as to give effect to the clear intent of the voters. It is true that every candidate is injured by laws which insist upon

counting the votes of those who vote for his adversary; but such "injury" is not a violation of any constitutional right.

The Civil Rights Act is not a statute for general collateral review by the federal courts of the correctness of state or Commonwealth judicial interpretations of local election laws. It is available only in certain limited circumstances when local governments have deprived citizens of the right of suffrage by acts of patent and fundamental unfairness. If this standard were enlarged as petitioners seek, federal courts would "be thrust into the details of virtually every election . . . ." See *Powell* v. *Power,* 436 F.2d 84, 86 (2d Cir. 1970).

The decision below correctly concludes that in the situation herein there is no basis for federal court intervention. Petitioner's claim is that the Supreme Court of Puerto Rico incorrectly decided that certain ballots were valid on the basis of its construction of local law. The Supreme Court of Puerto Rico's decision "enfranchises" voters by protecting and validating their undisputed intent; its interpretation of the local election law did not prevent anyone from voting; there was and could be no "reliance" by any party or person upon the literal terms of the election law which, if literally applied, raised serious constitutional questions by rendering invalid ballots for a minor, mechanical flaw, regardless of the manifest intent of voters and contrary to other regulations enjoining election officials to implement the manifest intent of the voters. Certainly, the decision does not violate the

standards of fundamental fairness of the due process clause.[13]

As the decision below indicates, the standards applied by the First Circuit to the situation at hand are those which it articulated in *Griffin* v. *Burns*, 570 F.2d 1065 (1st Cir. 1978), in which, under altogether different facts, it invalidated the results of a local election. There, after stating that all qualified voters have a constitutionally protected right to vote in local elections, the First Circuit stated the following due process standard: "If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under §1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots; and the question of the availability of a fully adequate state corrective process is germane. But there is precedent for federal relief where broad-gauged unfairness permeates an election, even if derived from apparently neutral action". (570 F.2d at 1077). The court pointed out, however, referring with approval to *Powell* v. *Power*, 436 F.2d 84 (2d Cir. 1970) and to *Pettengill* v. *Putnam County R-1 School District, Unionville, Missouri*, 472 F.2d 121 (8th Cir. 1973), that federal courts are not empowered to supervise and control local elections with respect to "garden variety irregularities", contests over the counting, marking and validation of ballots, and other errors and misconduct in the administration of local elections. Due process, the First Cir-

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[13] A translation of the opinion of the Supreme Court of Puerto Rico appears as Appendix H to the petition.

cuit held, is implicated only "where the entire election process—including as part thereof the state's administrative and judicial corrective process—fails on its face to afford fundamental fairness". (570 F.2d at 1078).

Applying those standards to the situation in this case, the First Circuit correctly held that the present case did not present a case for which relief under §1983 of the Civil Rights Act was appropriate. Its decision is clearly correct.

IV. PETITIONER LACKS STANDING, AND IT IS BARRED FROM COLLATERAL ATTACK ON THE JUDGMENT OF THE PUERTO RICO SUPREME COURT AND BY RES JUDICATA

Counsel for respondent consider it their duty to call this Court's attention to two fundamental bars to petitioner's suit. The first relates to petitioner's standing to maintain this action under § 1983. Petitioner is a political party in Puerto Rico which, until the last election, controlled the governorship and both houses of the legislature as well as most municipalities. In the last election, the Governor was reelected, but petitioner lost control of the Senate and most municipalities. Control of the lower House of the legislature and of a few municipalities, in this extraordinarily close election, is in doubt at the time of this writing, pending resolution by the Supreme Court of Puerto Rico of challenges to ballots on various grounds.

As filed, several individuals who were not electors in the affected districts, joined with petitioner in the complaint in the Federal District Court, That court, however, dismissed as to the individual plaintiffs for lack of a justiciable controversy as to them (District

Court Opinion, Pet. App. B, pp. 16a-20a). No appeal was taken by the individuals and their claim was not before the First Circuit (Opinion, Pet. App. A, p. 2a, footnote 1).[14]

Respondent's counsel failed to challenge the standing of petitioner and this question was not considered below. Since the standing of petitioner is jurisdictional, however, it may be considered by this Court. See *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 281 n. 14, 98 S.Ct. 2733, 2743 (1978); and *Juidice* v. *Vail,* 430 U.S. 327, 331, 97 S.Ct. 1211, 1215 (1977). The issue of course, is whether petitioner, a political party, has standing under §1983 to assert that the improper or "unlawful" counting of the contested ballots would deprive *petitioner* of constitutionally guaranteed rights. See *Singleton* v. *Wulff,* 428 U.S. 106, 96 S.Ct. 2868 (1976); *Warth* v. *Seldin,* 422 U.S. 490, 498-501, 95 S.Ct. 2197, 2205-2206 (1975), and *Duke Power Co.* v. *Carolina Environ. Study Group,* 438 U.S. 59, 71-81, 98 S.Ct. 2620, 2629-2634 (1978). Petitioner, being neither a candidate nor an affected voter, has no standing to assert deprivation of rights under §1983.

Another fundamental bar to petitioner's suit follows from the fact that its federal claim is, in substance and reality, a contention that the Supreme Court of Puerto Rico erred in its construction of the Puerto Rican statute; as we have shown, it is not a claim of federal right, flowing from §1983 and the Fourteenth

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[14] After the First Circuit's decision in the present case, the individuals, on January 22, 1981, filed their appeal from the District Court's order of dismissal. The record on appeal has not yet been submitted.

Amendment. So considered, petitioner's claim is barred by *res judicata* and, in any event, cannot be asserted by collateral attack.[15] Petitioner was a party, by intervention, to the action before the Puerto Rico Supreme Court. That judgment is final and petitioner is concluded by it. Further, petitioner could have sought review of the Puerto Rico Supreme Court's decision by certiorari from this Court. (28 U.S.C. §1258). It did not do so. Instead, it sought to nullify the Commonwealth judgment by collateral attack in the guise of a §1983 action. Exclusive jurisdiction to review judgments of the Supreme Court of Puerto Rico rests with this Court under 28 U.S.C. §1258. See *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149 (1923); Currie, *Res Judicata: The Neglected Defense,* 45 Univ. of Chi. L. Rev. 317, 321-325 (1978); and Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts,* 31 Hastings L.J. 1337 (1980).

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[15] The First Circuit recognized that petitioner "is arguably barred" by *res judicata* from litigating its claim, but it did not rule on the point, stating that "Without expressly deciding this issue, we have determined to proceed to the merits as we find it clear that, in any case, appellees PNP cannot prevail". (Pet. App. p. 3a, footnote 2).

V. CONCLUSION

For the reasons stated, respondent submits that this cause should not be reviewed by this Court and that the petition should be denied.

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April 8, 1981

FILED
APR 17 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1540

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PARTIDO NUEVO PROGRESISTA, *Petitioner,*

v.

GERINELDO BARRETO PEREZ, ADMINISTRATOR,
PUERTO RICO ELECTIONS COMMISSION,
AND
PARTIDO POPULAR DEMOCRATICO, *Respondents.*

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Petitioner Partido Nuevo Progresista submits this reply to the Brief in Opposition to Petition for Certiorari filed by respondent Partido Popular Democratico on April 8, 1981 (hereinafter "PPD Br.").

1. Respondent PPD persistently mischaracterizes petitioner's civil rights action as an attempt "to override the Supreme Court of Puerto Rico's interpretation of local law." PPD Br. 11; *see also id.* at 1-3, 12, 15-16. That is not so. Petitioner has never argued that the Supreme Court of Puerto Rico is not the final judicial authority on the construction of Puerto Rico law.

In accordance with the Supreme Court of Puerto Rico's judgment of December 2, 1980, it is now conclusively settled, as a matter of local law, that mismarked ballots "in which the intention of the elector may be inferred" are valid and may be "count[ed] as correctly cast." (Petn. App. 86a) This decree authoritatively supplants the explicit command of Article 1.033(b) of the Puerto Rican Electoral Law of 1977 that mismarked ballots "shall be null and void, and deemed unmarked." (Petn. App. 42a) The issue in this case is not whether the Puerto Rico Supreme Court's decision should be overturned as erroneous under Puerto Rico law.[1] The issue is whether the undoubted post-election *change* in local electoral law brought about by the Supreme Court's decision has resulted in a fundamentally unfair election in violation of the Due Process Clause. Where a post-election change in local law alters the outcome of an election, petitioner submits that a due process remedy should be available. Petn. for Cert. 12-13.

Respondent PPD acknowledges that its alternative *res judicata* argument can have force only if petitioner's suit is "considered" to rest on "a contention that the Supreme Court of Puerto Rico erred in its construction of the Puerto Rico statute." PPD Br. 15-16. Because such a view of petitioner's due process claim is erroneous, this Court (like the court of appeals below) may decide this case on its constitutional merits. *See also* Petn. for Cert. 13 n.9.

2. Petitioner does not understand respondent PPD's murky defense of the due process holding in *Snowden* v. *Hughes,* 321 U.S. 1 (1944). PPD Br. 7 n.8. This case

[1] The finding of a due process violation in this case would leave intact the Puerto Rico Supreme Court's interpretation of local electoral law.

presents the issue whether the Due Process Clause is one of "the special, fundamental federal guarantees" (*id.*) that, respondent PPD concedes, may provide the basis for federal intervention into state electoral matters. *Snowden* held the Due Process Clause unavailable; petitioner submits that that holding should be re-examined and overruled. Petn. for Cert. 6-10.

Snowden's teaching that a violation of state law, standing alone, does not give rise to a federal cause of action (PPD Br. 6-8) is a truism not disputed in this case. As petitioner has pointed out (Petn. for Cert. 12-13), not every election irregularity can or should be viewed as a due process violation. Accordingly, it is not accurate to assert, as respondent PPD does (PPD Br. 12), that recognition of petitioner's due process cause of action would "thrust" the federal courts "into the details of virtually every election." *See Powell* v. *Power*, 436 F.2d 84, 86 (2d Cir. 1970).

3. Respondent PPD suggests that the constitutional standards applicable to petitioner's due process claim are so well "established" or "settled" that this case is undeserving of the Court's attention. PPD Br. 4-9. In part, this contention rests on two aspects of *Snowden* v. *Hughes* not at issue here: the relation between state law and federal rights (*supra*) and the need to show "intentional or purposeful discrimination" to prove an *equal protection* violation. The remainder of respondent PPD's exposition of so-called "established" doctrine amounts to little more than a fact-specific recitation of the distinctions adopted by the First Circuit in this case. Respondent PPD does not and cannot assert that this Court has addressed the proper application of the Due Process Clause in a case such as this one.

4. Respondent PPD belatedly raises the issue of petitioner's standing, which was not challenged in either court below. PPD Br. 14-15. Standing is jurisdictional, and hence not subject to waiver, only in its "minimum" constitutional dimension under Article III, which requires a showing of " 'some threatened or actual injury resulting from the putatively illegal action.' " *See Regents of the University of California* v. *Bakke,* 438 U.S. 265, 280 n.14 (1978); *Warth* v. *Seldin,* 422 U.S. 490, 498-99 (1975). The threat to petitioner's control of the Puerto Rico House of Representatives and key municipalities as a result of this election dispute (Petr. for Cert. 4-5 & n.1; PPD Br. 14) plainly satisfies Article III's requirements. Moreover, respondent PPD erroneously implies that petitioner cannot assert "representational" standing on behalf of its candidates and member-voters, who face equally patent injury. *See Warth* v. *Seldin,* 422 U.S. 490, 510-11 (1975).

CONCLUSION

For the foregoing reasons and the reasons stated in petitioner's Petition for Certiorari, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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